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# ATTORNEY FACT-FINDING, ETHICAL DECISION-MAKING AND THE METHODOLOGY OF LAW

ROBERT RUBINSON\*

## INTRODUCTION

A classic question in legal ethics is whether it is “proper to put a witness on the stand when you know he will commit perjury.”<sup>1</sup> Many commentators have examined this question and proposed a range of resolutions, some of which have been adopted in codes of ethics.<sup>2</sup>

Consider, however, what this question does not ask. The propriety of putting “a witness on the stand when you know he will commit perjury” assumes the facts that bring the question into play, namely, that a client is

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1. Monroe Freedman, *Professional Responsibility of Criminal Defense Lawyers: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966) [hereinafter Freedman, *Three Hardest Questions*]. See also MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 27-42 (1975) [hereinafter FREEDMAN, *LAWYERS' ETHICS*]. This question “is now standard fare in the curriculum of every law school.” Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 352 (1994).

2. Monroe Freedman concluded that criminal defense attorneys must put a “perjurious witness on the stand without explicit or implicit disclosure” of the truth to judge or jury, Freedman, *Three Hardest Questions*, *supra* note 1, at 1477-78, although he has since modified his position. Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1953 (1988) (noting that a lawyer should seek to withdraw if a client insists on perjured testimony). However, the Model Rules of Professional Conduct mandate that a lawyer “take reasonable remedial measures”—including possible disclosure of confidential information—if the lawyer “has offered material evidence and comes to know of its falsity.” MODEL RULES OF PROF'L CONDUCT R. 3.3 (1999). See also *Nix v. Whiteside*, 475 U.S. 157 (1986) (attorney's disclosure of client confidences because of threatened client perjury would not violate Sixth Amendment right to counsel). For summaries of approaches and conclusions about this dilemma, see generally Silver, *supra* note 1, and DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 197-201 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*].

about to commit perjury. Like a medieval morality play, the character of "client" embodies only a single quality, that of "perjurer."

This submersion of facts in the "client perjury problem" typifies "ethics discourse"—the generalized way that scholars, teachers and professional organizations approach legal ethics. Facts are almost always skeletal and assumed in ethics discourse—an analytic move I call "fact formalism."

Examples of fact formalism in ethics discourse are legion. For example, two pervasive descriptions of ethical decision-making<sup>3</sup> are that attorneys must interpret rules "given the particularities of the situation"<sup>4</sup> or "considering the relevant circumstances."<sup>5</sup> The passive voice of "given" is telling: it is unclear who or what is "giving" the "particularities," and, indeed, it is rare even to conceive of this as a question worth asking. Similarly, the act of "considering circumstances" slips by unexamined, and thereby is implicitly a process that is reflexive or uninteresting. These formulations and their variants, while nodding to the importance of "particularities" or "circumstances," view the particular as setting the stage for the main event—exploring the choice and interpretation of rules.<sup>6</sup>

Another demonstration of fact formalism in ethics discourse is the prevalence of "fact hypotheticals." By supplying determinate facts, fact hypotheticals define away fact-finding as a matter for independent study.<sup>7</sup> Hypotheticals constitute what Clifford Geertz has called "radically thinned descriptions,"<sup>8</sup> and such "radical thinning" fails to reflect the complexities and ambiguities of fact-finding in practice. Even attempts to move beyond fact hypotheticals tend to assimilate the prevailing rules-focus of ethics discourse:

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3. I use "ethical decision-making" to refer to how attorneys approach ethics in practice. The distinction between "ethics discourse" and "ethical decision-making" is critical because, as I will demonstrate in detail, ethics discourse fails to reflect ethical decision-making as it occurs in the field. See *infra* text accompanying notes 22-190.

4. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 39 (1995) (emphasis added). See also Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 114 (1994) (noting that in discussing the interplay of rules and the "ethic of care," a goal is to explore how "to apply them to particular situations").

5. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 9 (1998) (arguing that attorneys should "take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice") (emphasis added) [hereinafter SIMON, *PRACTICE OF JUSTICE*].

6. Indeed, the legitimacy of ethics as a discipline worthy of serious study has been largely due to its growth in "doctrinal complexity." Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 723-24 (1988).

7. For other critiques of fact hypotheticals in ethics discourse, see *infra* text accompanying notes 70-71, 86-90.

8. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 16 (1973).

although there is burgeoning scholarship on teaching ethics “in context”<sup>9</sup> through such techniques as the “pervasive method,”<sup>10</sup> simulations,<sup>11</sup> and clinics,<sup>12</sup> these approaches are often viewed primarily as an effective means for teaching rules.<sup>13</sup>

These tendencies reflect the unspoken premise of fact formalism: the analysis, interpretation, and choice of rules, whether embodied in written ethics codes or drawn from principles of morality or justice, form the core of what legal ethics should be.<sup>14</sup> Although to be sure some commentators have

9. See, e.g., Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998); Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193 (1996). See also David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515-23 (1990) (arguing that “[c]ontext must replace universality as the touchstone of system design” and positing “five contextual categories” to guide the future development of ethical rules). I discuss this “contextual turn” in more detail *infra* text accompanying notes 35-46.

10. The “pervasive method” seeks to teach legal ethics across the law school curriculum as opposed to in a single course. The leading proponent of this method is Deborah L. Rhode. See DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (2d ed. 1998); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992) [hereinafter Rhode, *Pervasive Method*].

11. See, e.g., Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, 58 LAW & CONTEMP. PROBS. 37 (1995); Jonathan M. Freiman, *Steps Toward a Pedagogy of Improvisation in Legal Ethics*, 31 J. MARSHALL L. REV. 1279 (1998); Steven Hartwell, *Promoting Moral Development through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995).

12. See generally Luban & Millemann, *supra* note 4; Joan L. O’Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109 (1996); Robert A. Solomon, *Teaching Morality*, 40 CLEV. ST. L. REV. 507 (1992); Steven H. Leleiko, *Love, Professional Responsibility, the Rule of Law, and Clinical Legal Education*, 29 CLEV. ST. L. REV. 641 (1980).

13. For example, Bruce Green, in arguing for the adoption of ethics courses grounded in defined subject areas, says that such “context matters” because: 1) “particular rules of professional conduct and issues of professional conduct may or may not be very significant” in a given context; 2) “particular aspects of the other ‘law of lawyering’ may or may not be very significant”; 3) “particular regulatory mechanisms may or may not be very significant”; 4) “ethical rules and laws . . . may have different meanings depending on the context.” Green, *supra* note 9, at 382-84. See also Daly, *supra* note 9, at 194 (“contextual courses” on professional responsibility help students to “learn the rules governing lawyers’ conduct” and “debate the underlying public policies”).

14. See *infra* text accompanying notes 22-34. Indeed, proposals for modification of existing ethics codes and proposals for entirely new ethics codes are proliferating. See James Rodgers, *Ethics in 2000 and Beyond: Profession Hustles To Keep Apace of Changing Standards*, 85 A.B.A. J. 96 (1999) (citing the explosion of evolving ethical standards and rules reflecting changes in practice of law). For example, the federal courts will likely adopt uniform ethics rules (66 U.S.L.W. 2549 (1998)) and the ABA is undertaking a full-scale revision of the Model Rules called “Ethics 2000.” See Ethics 2000 Commission, May 2001 Report to the House of Delegates; American Bar Association, Report of the Commission on Evaluation of the Rules of Professional Conduct (November 2000). Ethics codes are being proposed and adopted in many areas,

attacked rules as not meaningfully influencing ethical conduct,<sup>15</sup> as (despite their rhetoric) a mechanism that primarily promotes professional self-interest,<sup>16</sup> or as sinking to the “lowest common denominator” of ethical obligation,<sup>17</sup> the primacy of rules as the preeminent object of inquiry in ethics discourse is rarely in question.

The problem with this emphasis is that while doctrinal issues are undoubtedly significant, the “given” facts of the prevailing methodology of legal ethics obscure a dimension of ethical decision-making that is of incalculable importance and of extraordinary richness and complexity.<sup>18</sup> To illustrate this point, assume that you represent a client named Ms. Cooper who has applied for disability benefits. Ms. Cooper has mental and physical impairments that are corroborated by medical records. The medical records also note at various points that the client has had a history of substance abuse. You know that impairments caused by continued or past substance abuse are virtually fatal to any disability claim.<sup>19</sup>

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including rules governing non-lawyer claimant representatives in proceedings before the Social Security Administration (67 U.S.L.W. 2074 (1998)), a code governing legal commentators (*A Proposed Code of Ethics for Legal Commentators: A Symposium*, 50 MERCER L. REV. 671 (1991)), and a code of ethics governing notaries public. *Code of Ethics for Notary Publics—The Notary Public Code of Public Responsibility*, 32 J. MARSHALL L. REV. 887 (1999). Proposals that would open up practice to nonlawyers still contemplate the imposition of ethical codes. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1270 (1995). Perhaps a culmination of this trend is the recent publication of the American Law Institute's Restatement of the Law Governing Lawyers. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). See L. Ray Patterson, *An Essay on Teaching Professional Responsibility*, 19 N. ILL. L. REV. 333, 338 (1999) (praising ALI's RESTATEMENT as providing a “unified approach” to ethical, procedural, and malpractice rules, and such an “integrated body of rules” should form the basis for course on Professional Responsibility). See also PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 26 (1998) (discussing a trend towards “propositional systematizations” in American law since the late nineteenth century).

15. See, e.g., John Ladd, *The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion*, in R. CHALK ET AL., *PROFESSIONAL ETHICS ACTIVITIES IN THE SCIENTIFIC AND ENGINEERING SOCIETIES* 154 (1980); Richard Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 641-52 (1981).

16. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 48 (1986) (alluding to the criticism of professional codes of ethics as “the products of grasping and selfish motivations, based on anticompetitive or class-based animus”); Abel, *supra* note 15, at 654 (“ethical rules contribute to market control” by lawyers); SIMON, *PRACTICE OF JUSTICE*, *supra* note 5, at 196 (professional associations which enact ethical norms “are both historically and structurally disposed toward more than occasional narrow self-interest”).

17. Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 46 (2000).

18. See *infra* text accompanying notes 119-90.

19. Termination and denial of benefits to claimants suffering from alcoholism and drug abuse was the result of amendments to the Social Security Act passed by Congress in 1996.

During a client interview, the following exchange takes place:

- You: Can you tell me about when your symptoms began?
- Ms. Cooper: Well, they started about ten years ago, after I got hit by a car. I started feeling dizzy after that, and the headaches started. I couldn't work because of those problems, so I got depressed. I just didn't know what to do with myself.
- You: I know this might be uncomfortable for you to talk about, but your records mention something about substance abuse.
- Ms. Cooper: Oh, yes, I took some drugs back then. I didn't know what else to do.
- You: Do you take drugs now?
- Ms. Cooper: Well, that's over now. I know that they don't solve any problems.
- You: I'm sorry I need to go into this, but do you take drugs at all now?
- Ms. Cooper: Oh, hardly ever. It's been some time now.

You press Ms. Cooper further about her drug use, but you fear that additional inquiry might strain the relationship that you have spent a great deal of time fostering with her. Ms. Cooper's responses to your inquiries vary from "I don't do drugs anymore" to "I might smoke a joint on the odd social occasion." Her general vagueness and inconsistency lead you to believe that she might be lying. But, then again, there is evidence to suggest that she suffers from mental impairments, and her inconsistency on this point might be the result of these impairments, or it might be the uncertainty that afflicts everyone about the timing of past behavior. You are unsure what to conclude.

At the hearing on her claim, you expect that the Administrative Law Judge will ask about the evidence of substance abuse, so you ask Mrs. Cooper about it yourself instead during direct examination. Her response: "Oh, I haven't done drugs for some time."

This brief description of a narrow slice of attorney/client interactions is itself "radically thinned," for it omits an enormous amount of verbal and non-verbal communication between attorney and client. You also do not know who "you" are—the nature of your practice, the amount of time you have to devote to this case, feelings of trust and loyalty you might feel towards Ms. Cooper or

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Contract with America Advancement Act, Pub. L. No. 104-121, § 105(a)(1), 110 Stat. 847 (1996). Recent studies showing that these actions have caused homelessness and an inability to afford rehabilitation services may lead Congress to reexamine the issue and, perhaps, increase social support services available to these individuals. *Study Tracks What Happened To Disabled People Who Were Eliminated From SSI in 1996* (National Public Radio broadcast, Sept. 15, 1999).

other clients, as well as many other details that might influence your interpretation of the circumstances.<sup>20</sup> Nevertheless, even this “thin” description does demonstrate that the issues of fact facing you—whether or not you construe the situation as one in which perjury has taken place—precede the issue of how to cure client perjury. This predicate question involves the construction and interpretation of facts, and this critical dimension of ethical decision-making takes place *within* the attorney/client relationship. This is no easy task; indeed, “[t]he difficult ethical problem . . . is not . . . what the rules say but whether the factual conditions have arisen that call the rule into question.”<sup>21</sup>

This Article confronts this largely invisible “difficult ethical problem” by exploring the significance, challenges, and complexities of fact-finding in ethical decision-making. In the first section, I investigate how and why ethics discourse repeatedly takes facts for granted. In so doing, I explore the astonishing pervasiveness of unreflective views of facts. Even the most sophisticated and influential scholars working the field today—William H. Simon and David Luban—remain fact formalists.

The second section focuses on the processes of fact-finding in ethical decision-making. The factual dimension of ethical decision-making is critical to the decision-making process and can be subjected to rigorous and systematic study. In approaching this study, I discuss how the methodology of fact-investigation and fact-finding has challenges and characteristics that are distinct from the more familiar methodology of interpreting rules. For example, constructing “what happened” or “what will happen” entails the assimilation and interpretation of many sources of information, including the motivations and ambivalence of clients. Moreover, the interpretation of facts is an interactive process that happens over time and is subject to myriad influences, both situational and psychological.

In the final section, I investigate how ethics scholarship and pedagogy should embrace a more reflective, sophisticated vision of ethics by recognizing issues of fact as crucial to ethical decision-making. I propose a fresh scholarly program that focuses on the processes of fact-finding by drawing upon ideas from psychology and cognitive science. I also offer a range of techniques that encourage instructors and students to grapple with fact-finding and fact investigation as a central component of legal ethics.

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20. For a description of these potential influences, see *infra* text accompanying notes 167-86.

21. Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV. 133, 139 (1992).

## I. FACTS AND CONVENTIONAL MODELS OF ETHICAL DECISION-MAKING

Ethics discourse has, with remarkable thoroughness and consistency, submerged the role that fact-finding plays in ethical decision-making. In this section I explore in detail how ethics discourse has approached and continues to approach fact-finding, and I investigate why this approach has prevailed for so long.

### A. *The Formalist Model of Ethical Decision-Making*

The conventional methodology of law assumes a fundamental distinction between law and fact.<sup>22</sup> While I will subsequently argue that an overly sharp delineation between fact and law is simplistic,<sup>23</sup> this distinction is so deeply embedded in the Anglo-American conception of "law" that legal discourse or the practice of law is inconceivable without it.<sup>24</sup>

Nevertheless, there are many ways to conceptualize the nature of "law," "fact," and the interactions between the two. The most rigid and orthodox approach is called "formalism." "Formalism" typically refers to a style of legal reasoning that mechanically applies a determinate rule to a determinate set of facts.<sup>25</sup> The mechanistic and determinate flavor of formalism is a powerful vestige from the Enlightenment, which held that it is a meaningful

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22. See *infra* text accompanying notes 25-34.

23. See *infra* text accompanying notes 156-66.

24. See Edward I. Rubin, *Law and the Methodology of Law*, 1997 WISC. L. REV. 521, 543 (arguing that while legal scholarship "emerge[s] from our system of pre-empirical beliefs," it embodies "ways of speaking about things that are important to us" and is therefore "meaningful"). This is not to say that the law/fact distinction is some universal characteristic of "law." To the contrary, systems of law in other cultures do not necessarily conceptualize adjudication in the same way. See CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 214, 222 (1983) (contrasting "the Western polarization of applicable law and pertinent fact" to Islamic, Indic and Malaysian notions of law as "interconnections between norms and happenings"); Andrew Huxley, *The Golden Yoke, Silken Text*, 106 YALE L.J. 1885, 1911 (1997) (in Tibetan Buddhist law, "parties, judges, and conciliators engaged in factoring, viewed each case as unique, did not cite previous legal situations as precedents, and therefore did not elaborate precedential chains of legal rules based on cases").

25. See Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyer's Heads*, 90 NW. U. L. REV. 1498, 1498-99 (1996) (formalism is the application of "the law laid down by legislatures and appellate courts to the facts of cases" in order to "generate answers"); Robert Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983) (defining formalism as "belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice"); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 793 (1989) ("Formalism" is the view that there exists a mind-independent reality consisting of certain first principles either of fact or value").



enterprise to “get a reliable fix on the world, a world that is, as it were, assumed to be immutable and, as it were, ‘there to be observed.’”<sup>26</sup>

While numerous critical theories of jurisprudence have challenged formalist assumptions for over a century<sup>27</sup> and self-proclaimed formalists—particularly in academia—are rare,<sup>28</sup> legal ethics, as a relative newcomer to the scene as a distinct academic discipline, has tended to retain more formalist methodology than other disciplines within law.<sup>29</sup> As manifested in ethics discourse, the mechanics of formalism are easy to describe:

Step One: The facts are *x*.

Step Two: The legal rule is *y*.

Step Three: *x* when applied to *y* yields result *z*.<sup>30</sup>

26. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1 (1991). In pursuing this goal, rationalists “looked inward to the powers of mind itself for the principles of right reason” while empiricists “concentrated on the mind’s interplay with an external world of nature, hoping to find the key in the association of sensations and ideas.” *Id.* The notion of the world as “immutable”—a submersion of the impact of time and change—is an especially critical dimension of ethics discourse. See *infra* text accompanying notes 72, 106-08.

27. An early and famous example is Oliver Wendell Holmes’ essay *The Path of the Law*, 10 HARV. L. REV. 457 (1897). A particularly influential critique of formalism has been the work of Ronald Dworkin. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986). Dworkin’s work has also had notable influence on leading theorists on legal ethics, especially William Simon. See, e.g., SIMON, *PRACTICE OF JUSTICE*, *supra* note 5, at 247. For overviews of other critical stances towards jurisprudential formalism, see generally THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., rev. ed. 1990), and Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1070-86 (1999) (summarizing attacks on formalism in the “Holmesian century”).

28. See Susan Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 36-37 (1996) (“formalism . . . no longer dominate[s] legal culture in these postmodern times”); Lopucki, *supra* note 25, at 1498-99 (noting widespread “contempt” for formalism in law schools). Perhaps the most prominent figure currently espousing conventional formalism is Antonin Scalia. See Antonin Scalia, *The Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175 (1988).

29. William Simon has noted that critiques of formalism have had less influence on conceptions of ethical decision-making than on judicial decision-making. SIMON, *PRACTICE OF JUSTICE*, *supra* note 5, at 10.

30. For comparable analyses, see Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992) (describing “pure formalists” as viewing adjudication as “a giant syllogism machine” with a determinate rule as the major premise, “objectively true, preexisting facts” as the minor premise, with a “conclusion that takes care of itself as a matter of logic”), and Paul Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 499 (1999) (referring to “conventional” ideas of moral theory in which “[t]heory produces the major premise within a syllogism; the facts of a given case serve as the minor premise; and the syllogism effects the answer”).

Far from being unique to law or legal ethics, this formalist process is the basis of what has been called the “Moral Law Folk Theory”—a deeply-embedded Western assumption about how to make moral decisions. MARK JOHNSON, *MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS* 7 (1993). This theory holds that “[m]oral reasoning is . . . principally a matter of getting the correct description of the situation [step one], determining

Step Two—choosing the proper legal rule or the proper interpretation of a legal rule—attracts the lion's share of attention in ethics discourse.<sup>31</sup> Step One—the fact-finding step—is predefined and merely a means to an end: the critical question is which rule or rules should apply to a given set of facts.<sup>32</sup> Once Step Two is established, Step Three is a mechanical exercise of applying “the facts” to the proper rule or interpretation of the rule to produce a single “right” result or, if the rule is discretionary, a choice of “right” results.

For example, in the client perjury problem, the question is whether it is “proper to put a witness on the stand when you know he will commit perjury.”<sup>33</sup> Step One is easy: you have a client who will lie on the stand. The “real” question is the Step Two issue of what the proper rule should be. One rule might be that an attorney is obligated to put a client who intends to perjure him or herself on the stand. Another rule might be that an attorney may not put the client on the stand. Once the Step Two choice is made (no easy matter as demonstrated by the great volume of scholarly commentary on the question<sup>34</sup>), the Step Three conclusion inescapably follows like a basic equation in mathematics.

### *B. Recent Developments: The Contextual Turn*

Recent academic discourse on ethics critiques formalism as too simplistic and mechanistic. Often this critical discourse focuses on the importance of “context” to ethical decision-making. While the meaning of “context” is not always clear, it tends to embody distaste for abstractions and rigid categories, as well as a greater sensitivity towards the complexity of practice in general<sup>35</sup> and ethical decision-making in particular.<sup>36</sup>

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which moral law pertains to it [step two], and figuring out what action that moral law requires for the given situation [step three].” *Id.*

31. See James R. Elkins, *Lawyer Ethics: A Pedagogical Mosaic*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 126 (2000) (“the law school study of lawyer ethics is first and foremost the application of a body of ethical rules”). See also *supra* text accompanying notes 1-17. Although not common in ethics analysis, an interesting phenomenon is the rise of explicit “balancing tests” that empower decision-makers to exercise discretion. See Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 209-12 (1991) (tracking twentieth-century expansion of judicial discretion); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1465 (1990) (noting that the rise of “balancing tests” assimilates the legal realist critique of formalism). While such rules may empower decisionmakers to consider a range of factors in rendering decisions, the problem remains that the facts that get plugged into these factors are rarely the subject of critical inquiry.

32. See *supra* text accompanying notes 1-6; *infra* text accompanying notes 70-71, 86-90.

33. See *supra* text accompanying notes 1-2.

34. See *supra* text accompanying note 2.

35. See, e.g., David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye Scholer*, 66 S. CAL. L. REV. 1145, 1152-54 (1993) (criticizing a “traditional model of legal

The reasons for this “contextual turn” are complex and varied. They appear to reflect related trends within jurisprudence,<sup>37</sup> philosophy,<sup>38</sup> and other social sciences,<sup>39</sup> and especially the influence of feminist perspectives, which often embrace the value of understanding moral and ethical judgment “in context” as opposed to merely examining the application of abstract principles.<sup>40</sup>

The meaning of “context” in ethics discourse, however, tends to focus exclusively on rules. Sometimes this focus is explicit. For example, a number of scholars have critiqued the development of “general, universal rules of ethics” and instead have urged the adoption of rules that would only apply to specific practice contexts.<sup>41</sup> One commentator—David Wilkins—articulates

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ethics” comprised of “broadly stated principles” and a “uniform enforcement system” that are not sensitive to the different types of practice engaged in by lawyers).

36. This is especially true of the work of William Simon and David Luban, whose scholarship I discuss *infra* text accompanying notes 47-72.

37. See, e.g., Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990); Catharine Pierce Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990). Issues of context—especially in the sense of the importance of understanding the socioeconomic circumstances in which law arises—were also an important element of legal realism. See, e.g., AMERICAN LEGAL REALISM 164-71 (William W. Fisher et al., eds. 1993).

38. Although far from consistent, the many forms of “postmodernism” do tend “to reject the idea of a universal, cohesive code of moral rules put in place by authoritarian institutions.” Kupfer, *supra* note 28, at 62. “Context” is an especially important element of “pragmatism”—a stance that has recently experienced some resurgence. See Morris Dickstein, *Introduction: Pragmatism Then and Now*, in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW AND CULTURE 8 (Morris Dickstein ed., 1998) (“[p]ragmatism is always contextual. It sees things not in isolation, not as essences existing in and of themselves, but as belonging to contexts that shape their meaning and value”).

39. See Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 743-44 (2000) (discussing the rise of “behavioral decision theory” in psychology as “[s]tudying the effect of context”); Brook K. Baker, *Beyond MacRate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 295-312 (1994) (describing “the emergence of a contextualist cognitive science”); Robert Robinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 129-30 (1999).

40. Feminist perspectives often emphasize “contextual factors” as a component of the “ethic of care” articulated by Carol Gilligan and others. See generally Menkel-Meadow, *supra* note 4; Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Janet Taber et al., *Project, Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1250 (1988). See also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

41. Wilkins, *supra* note 9, at 515. For another article that has similar goals but a different methodology, see Fred Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997). See also Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993). Indeed, there has been an explosion of ethics codes governing specific types of practice. See Zacharias, *supra*, at 190 (collecting

these contexts as including the types and location of practice (such as plaintiffs' or defendants' attorneys, or attorneys in large or small cities),<sup>42</sup> the posture of a given case (such as arguments to a judge as opposed to negotiations or client counseling sessions, which are usually not subject to judicial review),<sup>43</sup> and "practical constraints, such as time, resources, and habit."<sup>44</sup> These analyses then propose rules that better take into account the variegated circumstances in which ethical decision-making takes place.<sup>45</sup>

Sometimes, however, the focus on rules is less obvious. This is so in the work of William H. Simon and David Luban. Simon and Luban are the most influential theorists addressing the question of "whether lawyers are morally justified in fulfilling their traditional roles."<sup>46</sup> Both Simon and Luban are "activists" in this regard: they argue that lawyers should at times act in ways that are inconsistent with the goals of their clients in order to vindicate other values. In reaching this position, Simon and Luban embrace "context," spurn

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citations to "specialized codes of conduct covering lawyers engaged in particular areas of practice"). For some examples, see American Academy of Matrimonial Lawyers, *The Bounds of Advocacy: American Academy of Matrimonial Lawyers Standards of Conduct*, 9 J. AM. ACAD. MATRIM. LAW. 1, 3 (1992); Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. L. J. 45 (1998). A long-standing distinction sometimes drawn in the literature is between different ethical obligations in civil and criminal practice. Murray Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543; DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 58-66 (1988).

42. Wilkins, *supra* note 9, at 486-87.

43. *Id.* at 517. An influential article that also draws this distinction is Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 677-79 (1978) (suggesting that the "zealous advocate" model of lawyering might not apply in non-advocacy contexts).

44. Wilkins, *supra* note 9, at 515-16.

45. Issues of fact indeterminacy and fact-finding are rarely addressed in these critiques. For an exception, see *id.* at 482. These efforts are subject to another important critique: an emphasis on formally adopted, written ethical rules assumes that lawyers routinely consult ethics codes and that they would welcome codes more finely tuned to the many contexts and contingencies of practice. In fact, it is more likely that busy lawyers only look at ethics codes when they have to, and often not even then. For example, one commentator persuasively argues that most lawyers and judges in fact do not regularly consult legal rules as set forth in written texts, but instead rely on "mental models" of what the law is. See Lopucki, *supra* note 25, at 1510-11. As one commentator has put it when describing strenuous debates about modifying confidentiality rules, "[w]here the rubber meets the road, it isn't going to make a whole lot of difference." Michael D. Goldhaber, *Blowing a Whistle on Client Misdeeds*, NAT'L L. J., Oct. 25, 1999, at A10 (quoting John Toothman).

46. For a summary and critique of this debate, see Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 10-11 (1995). See also Heidi Li Feldman, *Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice*, 97 MICH. L. REV. 1472 (1999) (citing Simon and Luban as two leading commentators on legal ethics). While especially prominent, Simon and Luban are representative of a larger group of commentators who believe that a focus on ethical codes impoverishes ethics discourse. This diverse group of commentators look instead to moral philosophy and, in the case of Thomas Shaffer, to religion. See, e.g., Tremblay, *supra*, at 13-20; Johnson, *supra* note 17, at 25-29.

unreflective, formalist views of rules, and look beyond written codes of ethics for guidance in ethical decision-making. However, they continue to adhere to the “given the facts” assumptions underlying conventional models of ethical decision-making. In this sense, while these theories are anything but formalist in their treatment of “the law,” they are at bottom formalist in their treatment of facts.

### 1. William Simon’s “Practice of Justice”

Perhaps the preeminent contextualist in legal ethics is William H. Simon. In a series of influential articles<sup>47</sup> and in an important recent book,<sup>48</sup> Simon critiques traditional views of lawyers’ roles and develops a comprehensive new theory of legal ethics.

Simon critiques what he calls the “Dominant View” of lawyer’s ethics. The Dominant View holds that “the lawyer must—or at least may—pursue any goal of the client though any arguably legal course of action and assert any non-frivolous legal claim.”<sup>49</sup> The Dominant View adheres to a “categorical” style of decision-making in which “a rigid rule dictates a particular response in the presence of a small number of factors.”<sup>50</sup>

In contrast to the Dominant View, Simon argues for what he calls “contextualized judgment” by lawyers when resolving problems of legal ethics. Instead of the traditional notion that the primary—if not exclusive—role of lawyers is to pursue clients’ goals and ignore other interests at stake, lawyers should “take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”<sup>51</sup> Consequently, when justice so dictates, attorneys should act to the detriment of a client and in favor of third parties or the public interest.<sup>52</sup> The style of ethical decision-making associated with this justice orientation is not a “mechanical” and “mindless”

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47. See, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 217 (1988); William H. Simon, “Thinking Like a Lawyer” about Ethical Questions, 27 HOFSTRA L. REV. 1 (1998) [hereinafter Simon, *Thinking Like a Lawyer*]; William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65 (1991).

48. SIMON, PRACTICE OF JUSTICE, *supra* note 5. This work has already generated significant scholarly commentary, including a symposium issue devoted solely to the book. Symposium, *Review Essay Symposium*, 51 STAN. L. REV. 867 (1999).

49. SIMON, PRACTICE OF JUSTICE, *supra* note 5, at 7.

50. *Id.* at 9. Simon’s “categorical style of decision-making” is similar to my earlier description of the three-step process of formalism. See *supra* text accompanying notes 30-34.

51. SIMON, PRACTICE OF JUSTICE, *supra* note 5, at 138.

52. Simon does not suggest that lawyers should do so in all circumstances. To the contrary, Simon is careful to note that such “moral activism” is warranted only when it appears that there is no “institutional competence,” that is, the system of adjudication has broken down in a particular situation, thus forcing a lawyers’ hand as an institutional actor to insure that justice is done. *Id.* at 154-55.

application of ethical rules,<sup>53</sup> but rather a consideration of “contextual standards” of justice, thereby “engag[ing] the lawyer’s capacities for complex reflection.”<sup>54</sup>

Simon’s view that lawyers have a responsibility to act in the interests of justice—and his sense that justice is a matter of context—expands and enriches the norms that lawyers should take into account when resolving ethical problems. Simon’s analysis, however, retains conventional fact formalism. Simon wants to enrich “the range of considerations the decision-maker may take into account *when she confronts a particular problem*,”<sup>55</sup> but the “*particular problem*” remains predefined. Indeed, the “particular problem” is implicitly determinate and concrete in its particulars, while the complexity and flexibility arises through determining what norms justice may require. Similarly, Simon notes that lawyers should “take those actions that, *considering the relevant circumstances of the particular case*, seem likely to promote justice,”<sup>56</sup> but the challenging task of “*considering*” what the “*relevant circumstances of the particular case*” are drops out as not worthy of independent inquiry. In addition, the “essence” of “contextual judgment” is that it “applies relatively abstract norms to a *broad range of the particulars of the case at hand*.”<sup>57</sup> The challenge of interpreting these “*particulars*,” however, remains unexamined.

The examples Simon uses to illustrate his conception of justice further demonstrate how issues of fact are submerged in his analysis. In discussing the actions of the law firm of Kaye, Scholer, Fierman, Hays & Handler in representing Lincoln Savings & Loan, Simon sets forth the government’s allegations against the firm with only a parenthetical reference to how these allegations are “disputed by Kaye Scholer.”<sup>58</sup> This “given these facts” perspective serves Simon well when he later discusses how Kaye Scholer should have been more candid with government investigators under Simon’s view of attorneys’ obligation to justice.<sup>59</sup> However, as I discuss in greater

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53. *Id.* at 15.

54. Simon, *Thinking Like a Lawyer*, *supra* note 47, at 6. Although Simon is not entirely clear as to his intended meaning of “context,” he sets out in detail “considerations” that attorneys should take into account in promoting justice. One consideration would be the proper rules embodying “the basic values of the legal system,” which comprise not only positive law, but also “vaguely specified aspirational norms.” SIMON, PRACTICE OF JUSTICE, *supra* note 5, at 138. Another consideration is whether procedures in a given case will promote justice; “the more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution,” and vice versa. *Id.* at 140. Presumably these two “considerations” determine “context.”

55. Simon, *Thinking Like a Lawyer*, *supra* note 47, at 9 (emphasis added).

56. *Id.* at 138 (emphasis added).

57. *Id.* at 10 (emphasis added).

58. *Id.* at 6.

59. *Id.* at 166-68.

detail below<sup>60</sup> and as Simon has acknowledged elsewhere,<sup>61</sup> the facts surrounding Kaye Scholer's representation of Keating and Lincoln were far more uncertain than Simon's discussion allows. By adopting the scholarly equivalent of a judge assuming that all "well pled facts are true," Simon eliminates fact-finding as a subject of his inquiry.<sup>62</sup>

Simon's assault on formalism in ethics discourse, therefore, extends only to rules.<sup>63</sup> He remains a fact formalist.

## 2. David Luban's "Moral Activism"

Like Simon, David Luban has wrestled with conflicts between the traditional imperatives of legal ethics and other moral obligations.<sup>64</sup> While

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60. See *infra* text accompanying notes 138-51.

61. See William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243, 245 (1998) ("we have limited knowledge of the facts" of Kaye, Scholer's actions in the Keating matter, and "one risks . . . doing an injustice to Kaye Scholer" by assuming the charges against the firm to be true).

62. Another example Simon uses is an interesting case study in how ethics discourse simplifies facts in order to illuminate conflicts of principle. Simon draws upon a classic ethical dilemma that is purportedly historical: "In about 1914 Arthur Powell, a Georgia lawyer, received information from a client establishing the innocence of Leo Frank. Frank had been convicted in Atlanta of the murder of a young girl at a trial notoriously marred by anti-Semitism and mob hysteria. Because the client would not consent to disclosure, Powell did not communicate this information to anyone." After his sentence was commuted to life imprisonment, Frank was lynched by a mob. SIMON, PRACTICE OF JUSTICE, *supra* note 5, at 4. Frank's innocence, the blatantly unfair nature of his trial, and the horrors of his lynching are all beyond dispute. However, the setup of the ethical dilemma is not: Simon tellingly acknowledges in a footnote that he "assume[s] for heuristic purposes that the information [about the identity of the murderer] came from the real murderer, although Powell's account is ambiguous on this point." *Id.* at 236. In fact, Powell's account never even hints that the information came from a client, let alone the real murderer; he only states that he "can never reveal it [make public the source of the information] so long as certain persons are alive." ARTHUR G. POWELL, I CAN GO HOME AGAIN 291 (1943). Powell also notes that Jack Slaton, the governor of Georgia at the time, also knew of Frank's innocence although Powell never discussed this fact with Slaton—a fact that, if anything, suggests that the source of Powell's information was not a client. *Id.*

63. Interestingly, Simon does mention how sometimes lawyers "talk of abstract norms as subjective and of facts as indeterminate," but he criticizes this stance as equivalent to a conception of decision-making that "is necessarily arbitrary." SIMON, PRACTICE OF JUSTICE, *supra* note 5, at 10. I address this fear of fact indeterminacy *infra* text accompanying notes 109-114.

64. Luban's most comprehensive treatment of his basic ideas is in LUBAN, LAWYERS AND JUSTICE, *supra* note 2. Another influential work by Luban is his earlier anthology, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983). In many respects, Simon and Luban are, in Luban's words, "kindred spirits" in their shared critique of one-dimensional "adversarial ethics" which fails to recognize ethical commitments by lawyers separate and apart from lawyers' roles as advocates. David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 874 (1999). Luban and Simon, however, do differ in that, for example, Luban finds these commitments in "morality" while Simon finds them in "justice" as

Simon argues that “legal ethics” should encompass the idea of “justice.”<sup>65</sup> Luban frames his argument in terms of resolving tensions between legal ethics (or, to put it in Luban’s terms, obligations implicated by a lawyer’s “role morality”) and “common morality.”<sup>66</sup> In so doing, Luban critiques what he calls the “institutional excuse” or, as applied to lawyers, “the adversary system excuse.”<sup>67</sup> Through such a justification, a lawyer (or anyone playing a social role) “excuse[s] herself from conduct that would be morally culpable were anyone else to do it” because it is the social role, not the individual actor, that dictates the action.<sup>68</sup>

Luban’s critique of the “institutional excuse” is far too detailed and complex to summarize adequately here. His general approach, however, is instructive. Luban’s analytic model for how ethical problems should be resolved is what he calls “the fourfold root of sufficient reasoning.” This model holds that when confronted by ethical dilemmas, lawyers should analyze: 1) the adversary system and its justifications; 2) the role of an advocate and “its derivation from the institution’s requirements;” 3) the nature of the implicated role obligation “and its derivation from the role’s requirements;” and 4) the actual act at issue “and the demonstration that it is an instance of the role obligation.”<sup>69</sup>

Among Luban’s examples designed to illustrate the application of his “fourfold root” is that of “a lawyer defending a rapist, whose client has informed the lawyer that he is guilty, but who insists on offering as a defense the falsehood that the victim consented to have sex with him.”<sup>70</sup> The ethical question is whether the lawyer can cross-examine the victim about her sex life and use the testimony of an ex-boyfriend as corroboration. Luban’s analysis shirks easy answers; he wrestles not only with the interest of the adversary system in protecting criminal defendants, but also with the interest of the adversary system in “ensur[ing] that rape victims can step forward to accuse their assailants without their own sexuality being turned into the centerpiece of the trial.”<sup>71</sup> However, the familiar fact formalism remains; it is the rare client

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embodied in “law.” *Id.* at 875-876. See Tremblay, *supra* note 46, at 22-67 (comparing and critiquing the theories of Simon and Luban).

65. SIMON, PRACTICE OF JUSTICE, *supra* note 5, at 138.

66. See, e.g., LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 105-46.

67. *Id.* at 54-56.

68. *Id.* at 56. Luban’s idea of an “institutional excuse” is a broad term meant to encompass how anyone, including a lawyer, uses her “role in a social institution” to excuse conduct that would otherwise be morally questionable. *Id.* See also David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 84-113 (1983).

69. LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 132.

70. *Id.* at 150.

71. *Id.* at 151. Luban eventually concludes by “a very close call” that the attorney should not cross-examine the victim about her sex life. *Id.* at 152. This factual scenario is a common



indeed who, in the typically bland style of fact hypotheticals, “informs the lawyer that he is guilty.” Far more common are shades of gray: determining the truthfulness of witnesses (whether the witness is your client or the ex-boyfriend) over time and folding these determinations into constructing an effective defense.

Luban’s analysis, however, also offers deeper insights into the assumptions underlying fact formalism. In terms of time and complexity, Luban’s “fourfold root of sufficient reasoning” is quite an order to fill for a practicing attorney. Luban’s response to this objection is fascinating:

[T]he most cerebral parts of the deliberation, the abstract evaluation of the institution, role, and role obligations contained in the first three links of the fourfold root, need not be done over and over again. The purposes and justifications of your occupational role and the institutions in terms of which it exists are familiar: you must come to grips with them some time in your career, but they do not have to be reinvented each time you confront a dilemma. They don’t have to be thought through by you personally, except to assess their relevance to *the case at hand*: you can read about what justifies confidentiality, or the adversary system, in a book like this one. *The only deliberative acts that must be performed on the spot are those needed to bring these rather abstract assessments to bear on the dilemma at hand. And this may take seconds to think through—we are talking, after all, of deliberation, not a cost-benefit analysis by Coopers & Lybrand.*<sup>72</sup>

Consider the vision of time implied by Luban’s analysis. Attorneys should expend long hours of deliberative study on “abstract evaluation.” In contrast, the fact-based dimension of ethical decision-making is effortless. The time required to apply rules to facts is an “on the spot” process that requires only “seconds to think through.” Moreover, the process of determining what the facts are does not even warrant mention; facts are already—as Luban notes twice—“at hand,” and thus their interpretation or investigation impliedly requires no effort at all. Luban also values “abstract deliberation” as “the most cerebral” aspect of his model. In contrast, the fact-based elements of his model are mechanistic and undemanding. It is easy to see how the mythical client “who has informed his lawyer that he is guilty” fits easily into this factually bare environment.

Luban’s description of his model is a rarity: an explicit discussion of the temporal world implied by the fact formalism that typifies ethics discourse generally.

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one in ethics discourse. For further discussion of this example, see *infra* text accompanying notes 86-87.

72. *Id.* at 141 (emphasis added).

#### D. Fact-Finding in Ethics Discourse: Three Examples

While largely marginalized, ethics discourse does address fact-finding in three related areas of inquiry: the issue of what lawyers “know” (the “epistemology problem”), the issue of attorneys who consciously avoid knowledge of their clients’ activities (the “avoidance of knowledge” or “contrived ignorance” problem), and the issue of an attorney’s “standard of knowledge” of client wrongdoing. While these topics offer insights into the role of facts in ethical decision-making, they are also important for what they do not address. I will review each of these issues in turn.

##### 1. “Can Lawyers Know the Truth?”

One way to describe theories of adjudication is through the analogy of how umpires call balls and strikes in baseball.<sup>73</sup> An umpire might claim that balls and strikes “ain’t nothing until I call them.”<sup>74</sup> Even if an umpire is “wrong” under the terms of some sort of “objective” criteria, the rules of the game mandate that a ball is only a ball and a strike is only a strike if the umpire says so. The players in the game must abide by this “truth” if the game is to have meaning.

A similar point arises in ethics discourse in the context of a lawyer’s obligation not to present perjured testimony.<sup>75</sup> One argument holds that lawyers can never “know” the truth or falsity of a defense, fact, or claim until it is found to be true or false by a finder of fact, that is, a judge or jury. In other words, in the specialized world of adjudication, the only meaningful “truth” is “legal truth” as found by judges or juries—the “umpires” of adjudication—and not by lawyers.<sup>76</sup> Since lawyers are not umpires and thus can never “know” the truth in this sense, they can assert a “false” defense, fact, or claim at trial without suborning perjury because it is not “legally false.”

This issue played an important role in a noted scholarly debate between Harry I. Subin and John B. Mitchell about whether a criminal lawyer has a “right” to present a false defense.<sup>77</sup> Subin’s position is that once a criminal

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73. See Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 233-34 (1994).

74. *Id.* at 234.

75. MODEL RULES OF PROF’L CONDUCT R. 3.3 (1996).

76. As with many other issues in legal ethics, Monroe Freedman was an early and influential commentator on this subject. See FREEDMAN, *LAWYERS’ ETHICS*, *supra* note 1, at 51-58. As Freedman observes, the intellectual pedigree of this idea extends at least as far back as Samuel Johnson, who observed that a lawyer does not know a “cause . . . to be bad . . . till the Judge determines it.” *Id.* at 51.

77. Harry I. Subin, *The Criminal Lawyer’s “Different Mission:” Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) [hereinafter Subin, *Reflections*]; John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission,”* 1 GEO. J. LEGAL ETHICS 339

defense attorney finds that the “state’s case is legally and factually sound,” the defense attorney cannot affirmatively propound inconsistent evidence; rather, the attorney should only “monitor” that the state prove “all of the elements of the crime . . . beyond a reasonable doubt.”<sup>78</sup> Subin rejects the “legal truth” argument—the position that “[t]he truth, insofar as it is relevant to the lawyer, is what the trier of fact determines it to be.”<sup>79</sup> Subin argues that “[p]lainly one can know the factual truth” and it is the “factual truth” that is at issue in ethical rules.<sup>80</sup>

In contrast, Mitchell holds that attorneys must be affirmative advocates and never mere “monitors.” Mitchell argues that in the adversary system, “there are not such things as facts,” but “only information, lack of information, and chains of inferences therefrom.”<sup>81</sup> According to Mitchell, a “false defense” is not false; it instead seeks to weaken the state’s inferences by presenting alternative inferences and plausible stories of “what happened.” As a result, “legal truth” is the only truth at issue in adjudication and he intimates without elaboration his belief that historical facts are never “knowable” in Subin’s “factual truth” sense.<sup>82</sup>

The Subin/Mitchell debate takes an important step: it identifies issues of fact as worthy of scrutiny. The debate also hints at some of the complexities underlying the process of attorney fact-finding. As Subin admits, “in most cases the defense attorney will not have the degree of certainty as to the facts”—that is, the “factual truth”—to conclude that a “false defense” is even at issue.<sup>83</sup> Mitchell goes further by alluding to deeper epistemic concerns about the certainty of knowing “factual truth” however distinguished from “legal truth.”<sup>84</sup> Nevertheless, while these statements are a relatively rare recognition in ethics discourse of the difficulty of fact-finding, they continue to leave this process unexplored.<sup>85</sup>

Moreover, like Simon and Luban, Subin and Mitchell adhere to the conventions of ethics discourse by constructing hypotheticals that assume simple, determinate sets of facts. Subin supports his position through a

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(1987). Subin replied to Mitchell in Harry I. Subin, *Is This Lie Necessary? Further Reflections On The Right To Present A False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988) [hereinafter Subin, *Further Reflections*].

78. Subin, *Reflections*, *supra* note 77, at 147.

79. *Id.* at 136.

80. *Id.* at 138.

81. Mitchell, *supra* note 77, at 345. Monroe Freedman adheres to a similar position. See FREEDMAN, *LAWYERS’ ETHICS*, *supra* note 1, at 53.

82. Mitchell, *supra* note 77, at 350-51.

83. Subin, *Further Reflections*, *supra* note 77, at 702.

84. Mitchell, *supra* note 77, at 343.

85. Another limitation of the factual truth/legal truth debate is that it only has meaning in the context of litigation. In the numerous practice contexts where there is no decision-maker, “legal truth” is meaningless because there is no judge to give it content.

variation on the factually thin hypothetical also employed by David Luban:<sup>86</sup> an attorney must decide whether it is permissible to present a defense of consent in a rape case when the client has “admitted his guilt” that he forcibly raped a victim without her consent.<sup>87</sup>

Mitchell makes comparable moves. Mitchell sets forth a hypothetical involving a woman accused of stealing a Christmas tree ornament. To simplify matters, this client also admits her guilt, including her unambiguous admission to her attorney that she fully intended to steal the ornament.<sup>88</sup> In a subsequent hypothetical, Mitchell is representing a client accused of robbery. Mitchell has “seen the victim at a preliminary hearing, and based upon the circumstances of the identification and my overall impression of the witness, I am certain that he is truthful and accurate.”<sup>89</sup> The factual simplifications of this second example are especially strained: after all, “circumstances” and “impressions” tend to produce possibilities and rarely (if ever) certainties.<sup>90</sup>

Nevertheless, the “factual truth/legal truth” debate at least offers intimations that there are, at a minimum, multiple ways of looking at facts, and, at least in Mitchell’s view, no “right” way to view facts at all.

## 2. Avoidance of Knowledge

Some commentators have noted that attorneys on occasion willfully avoid knowing facts.<sup>91</sup> This “avoidance of knowledge” maneuver seeks to sidestep the thorny issue of determining what evidence is merely “misleading” or “plausible,” and thus fair game at trial, from what is false or perjured, and thus illegitimate.<sup>92</sup> In the paradigmatic “avoidance of knowledge” situation, a criminal defense lawyer does not ask her client whether the client “did it,” thereby preserving the attorney’s freedom to decide what evidence to adduce at trial without having to worry about whether the evidence is false or perjured.<sup>93</sup> As a result, attorneys can develop evidence that is helpful to the case while

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86. See *supra* text accompanying notes 70-71.

87. Subin, *Reflections*, *supra* note 77, at 133. For yet another formulation of this hypothetical, see, FREEDMAN, *LAWYERS’ ETHICS*, *supra* note 1, at 43-45.

88. Mitchell, *supra* note 77, at 343-44.

89. *Id.* at 352.

90. See *infra* text accompanying notes 119-55.

91. For a recent and thoughtful treatment of this issue see David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999). See also STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 402 (1998).

92. As demonstrated by the Subin/Mitchell debate, the issue of whether criminal defense attorneys can present a “false” defense is a live issue that is the subject of debate. See *supra* text accompanying notes 75-90. However, there is no question that ethical rules would prohibit the presentation of *specific evidence* that an attorney “knows to be false.” MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1996).

93. Luban, *supra* note 91, at 957-58.

maintaining a scrupulous ignorance about whether this evidence reflects what “really happened.”<sup>94</sup>

One obvious problem with this technique is that by solving one ethical issue it raises another. If, as is often the case, an attorney *suspects* that evidence is false, further fact investigation relating to the evidence might lead to important information critical to the representation. Ms. Cooper’s case is a good example:<sup>95</sup> the issue of substance abuse is not merely a matter of ethics, but a matter that is at the core of legal issues relating to Ms. Cooper’s entitlement to benefits and strategic questions about how to handle the issue at the hearing. By merely “avoiding knowledge” of Ms. Cooper’s substance abuse, an attorney is ignoring facts that are crucial to case development and preparation and that may explode negatively at a hearing. As such, “avoidance of knowledge” may lead to incompetent representation.

In any event, the issue of “avoidance of knowledge” does illuminate a crucial insight about facts and ethical decision-making: the reason that the “avoidance of knowledge” strategy could work at all is that attorneys confronting ethical problems are their own finders of fact. Since every ethical rule requires a factual predicate and lawyers themselves determine whether such a factual predicate exists, attorneys can control the process of ethical decision-making through fact-finding. This deceptively simple point—rarely acknowledged in ethics discourse—demonstrates the extraordinary impact of fact-finding on ethical decision-making.<sup>96</sup>

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94. While there is relatively little scholarship on the “avoidance of knowledge” issue, the ABA has criticized this strategy in a number of ethics opinions. See ABA Comm. On Ethics and Professional Responsibility, Formal Op. 87-353 n.9 (1987) (lawyers who “follow a practice of not questioning the client about the facts in the case and, therefore, never ‘know’ that a client has given false testimony . . . may be violating their duties under Rule 3.3”). See also ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1470 (1981), which states:

A lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants.

David Luban, however, does not support prohibiting “contrived ignorance.” Luban argues that such a rule would inject suspicion into the attorney/client relationship because the lawyer “may be forced to play a cat-and-mouse game of sleuthing against her own evasive clients.” See Luban, *supra* note 91, at 976-77.

95. See *supra* text accompanying notes 120-23.

96. See Freedman, *Three Hardest Questions*, *supra* note 1, at 1472 (while “a defense attorney can remain selectively ignorant . . . [i]t is inconceivable, however, that an attorney could give adequate counsel under such circumstances” because “a lawyer can never anticipate all of the innumerable and potentially critical factors that his client, once cautioned, may decide not to reveal.”); FREEDMAN, *LAWYERS’ ETHICS*, *supra* note 1, at 30 (“[P]rofessional responsibility requires that an advocate have full knowledge of every pertinent fact,” and thus “the lawyer must seek the truth from the client, not shun it.”). Similarly, an ABA Ethics Opinion concludes that failure to question “the client about the facts” in order to avoid ethical problems raises the

That said, “avoidance of knowledge” as commonly formulated only goes so far. The issue presupposes a conscious, strategic decision by an attorney to “avoid knowledge.” While at least implicitly alluding to the power of fact-finding, this simplified scenario sidesteps the far more complex processes at play when attorneys confront factual uncertainty<sup>97</sup> or are subject to the many influences that may favor one finding of fact over another.<sup>98</sup> Thus, while “avoidance of knowledge” demonstrates the importance of attorney fact-finding, it is not an especially useful vehicle for exploring the complexities of fact-finding in practice.<sup>99</sup>

### 3. Standards of Knowledge

A final issue relating to fact-finding that on occasion percolates in ethics discourse involves “standards of knowledge”—the degree to which an attorney should be certain as to facts before ethical obligations are triggered. Again the paradigmatic situation relates to the client perjury problem. The “standard of knowledge” question here is how certain an attorney should be about a client’s perjury before the attorney undertakes (using the language of the ABA Model Rules) “reasonable remedial measures.”<sup>100</sup>

In exploring these issues, most commentators explicitly or implicitly adopt the language of burdens of proof.<sup>101</sup> Subin, for example, asserts that a criminal defense attorney should be limited to a monitoring role only when an attorney believes “beyond a reasonable doubt” that a defense is false.<sup>102</sup> The standard

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possibility of incompetent representation. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 87-353 n.9 (1987). See also ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1(a) (1993) (“Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.”).

97. See *infra* text accompanying notes 136-51.

98. See *infra* text accompanying notes 167-86.

99. I suggest a broader, more “factually thick” approach to “avoidance of knowledge” after discussing in detail the process of fact-finding. See *infra* text accompanying notes 232-36.

100. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1996).

101. See, e.g., Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 149 (1985) (proposing that lawyers must “be convinced beyond a reasonable doubt that the client’s testimony will be perjurious” before declining to present the testimony); FREEDMAN, *LAWYERS’ ETHICS*, *supra* note 1, at 54 (in exploring an attorney’s duties in the face of client perjury, an important question is “whether the standard of knowledge should be based upon certainty, belief beyond a reasonable doubt, clear and convincing evidence, etc”).

102. Subin, *Reflections*, *supra* note 77, at 142. See *supra* text accompanying notes 78-80. See also *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988) (stating “a clear expression of intent to commit perjury is required before an attorney can reveal client confidences”); *Grievance Committee of the United States District Court v. Federal Grievance Committee*, 847 F.2d 57, 61 (2d Cir. 1988) (holding in order for an attorney to have an “ethical duty to report a fraud on the court . . . the lawyer must have ‘clear and convincing evidence’ that a fraud on the court has

of knowledge question therefore recognizes degrees of uncertainty inherent in the process of attorney fact-finding, and, as with the Subin/Mitchell debate, this highlights an important dimension of facts and ethical decision-making.

Nevertheless, while offering rules about the requisite certainty for findings of fact, the "standard of knowledge" issue does not explore the process of fact-finding. It does not address, for example, how an attorney can or should go about determining the degree to which the attorney is "certain" of facts,<sup>103</sup> or issues relating to an attorney's control over decisions about the degree of "certainty,"<sup>104</sup> or what influences an attorney in determining whether the requisite level of certainty has been met.<sup>105</sup>

#### D. *Why Are Facts Devalued in Ethics Discourse?*

The discussion thus far has explored the at most peripheral role that fact-finding plays in ethics discourse. Before examining the process of fact-finding in detail, it is worth a brief detour to examine the fascinating question of why facts are marginalized in the first place. While a full exploration of this question exceeds the scope of this Article, the beginnings of an answer may be found in assumptions embedded in Western moral philosophy as well as in the conventions of legal analysis.

First, there is a deep-seated bias against facts and "particulars" in a great deal of moral philosophy that extends at least as far back as Plato. Plato's famous metaphor of the cave from *The Republic* describes a "realm of unchanging existence" called the Forms, and "the educational system will have to be directed and controlled by those who already have made the prerequisite ascent from the vision of particulars to the vision of the Forms."<sup>106</sup> A related Western bias values constancy over change and holds that "it is possible to decontextualize propositions."<sup>107</sup> In such a world, pure, universal forms and unchanging rules are the goals of serious inquiry, while the importance of the

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occurred "). In addition, the issue of standards of knowledge for attorneys concerned Justices O'Connor and White during the oral argument for *Nix v. Whiteside*, 475 U.S. 157 (1986) discussed *infra* text accompanying notes 273-77, although the published opinion does not address the issue. See Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1940-1946 (1988).

103. See *infra* text accompanying notes 124-51.

104. See *infra* text accompanying notes 120-23.

105. See *infra* text accompanying notes 167-86.

106. ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY* 53 (1998). See PLATO, *THE REPUBLIC* 316-325 (Desmond Lee trans., Penguin 2d ed. 1974) (noting that "the mind as a whole must be turned away from the world of change until its eye can bear to look straight at reality").

107. Kaiping Peng & Richard E. Nisbett, *Culture, Dialectics, and Reasoning About Contradiction*, 54 AM. PSYCHOLOGIST 741, 742 (1999). This view is in contrast to others, particularly Buddhist, which emphasize that "the world is in constant flux." *Id.*

“vision of the particulars” is recognized less, and the inherent ambiguity and fluidity of these “particulars” is recognized less still.<sup>108</sup>

Second, despite Holmes’ endlessly repeated observation that “the life of the law is not logic, but experience,”<sup>109</sup> rule-based logic and its attendant claim of rationality continue to define the methodology of law.<sup>110</sup> The origins of this tendency are complex. Perhaps one answer is that a core justification for adherence to law is that it is subject to “neutral” application through logic and reason: rules equally constrain everyone and thereby prevent despotism and anarchy by inhibiting the unbridled discretion of those in power.<sup>111</sup> If generality is the key, then the best way to test generality, and thus the efficacy of rules, is to apply rules to as many particular situations as possible.<sup>112</sup> In this sense, facts are useful only insofar as they demonstrate the propriety of rules. The uncertainty and complexity so pervasive in fact-finding clouds this picture, and thus the fact-finding process tends to get submerged.<sup>113</sup>

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108. There, of course, have been critics of this emphasis on the “universal,” from Aristotle to, most recently, American pragmatists, feminists, and postmodernists. See Tremblay, *supra* note 30, at 510 (referring to philosophical challenges to the Platonic tradition’s elevation of “rules, abstract principles, and universal truths” over the “particular”). For example, the pragmatist John Dewey, whose ideas are currently enjoying a resurgence, wrote how “unreconciled diversity,” “the recalcitrant particular . . . the ambiguousness and ambivalence of reality” has wrongfully been relegated to a “metaphysically inferior” stance in contrast to “unity” and “permanence.” JOHN DEWEY, *EXPERIENCE AND NATURE* 46 (1926). Among legal scholars, the legal realists often derided conceptions of law that viewed it as a construct of “absolute purity, freed from all entangling alliances with human life.” Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

109. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

110. See generally SCHLAG, *supra* note 14.

111. See, e.g., LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 49 (“It is only its generality, its fairness, that elevates law from a coercive system to a system exerting moral—and not just physical—force. Undermine generality and you undermine the very legitimacy of law, reducing it once again to coercion.”). See also SCHLAG, *supra* note 14, at 20 (reason and the rule of law “is the mechanism by which emotions, interests, and force are supposedly kept in check”).

112. This view draws inspiration from the comfortable precision of classical physics, where the “truth” of rules are empirically verifiable. In physics this comfortable realm has been shaken in the twentieth-century through Heisenberg’s Uncertainty Principle and Godel’s Theorem, which holds that every proof must, in turn, ultimately rest upon an unprovable assumption. See, e.g., GEORGE JOHNSON, *FIRE IN THE MIND: SCIENCE, FAITH, AND THE SEARCH FOR ORDER* 43, 315-16 (1995).

113. There also might be a cognitive bias at work here as well: research has shown that people “have a strong preference for the elimination of uncertainty.” Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1504 (1998); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 747-48 (2000) (describing cognitive “aversion to ambiguity”). See also *infra* text accompanying notes 126-34.



Third, if rule-based logic is the touchstone of legal analysis, the discovery and articulation of facts also must itself be a strictly rational process. If this is not the case, fact-finding becomes a kind of joker in the deck introducing an unconstrained, erratic element into the otherwise orderly process of legal analysis and adjudication, thus endangering the legitimacy of the whole enterprise. What happens, then, is that facts are presented as orderly and certain, with the unspoken assumption being that this order and certainty are constrained by reason.<sup>114</sup> The consequence is that the underlying messiness and indeterminacy of fact-finding are submerged.

Fourth, fact investigation does not appear to be a technical exercise that requires "professional" expertise. To the contrary, as we navigate through the world, interpreting facts is done all the time by everyone, lawyers and non-lawyers alike, and thus (so the assumption goes) it does not warrant intensive scrutiny in legal scholarship or in law school.<sup>115</sup> Indeed, the preeminent "finders of fact" in the adversary system are not legal professionals, but lay juries.<sup>116</sup> In contrast to this view, however, some scholars have explored in depth how critical fact investigation (and the narratives that emerge from it) and the related tasks of interviewing are to the art of lawyering.<sup>117</sup>

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114. For a related analysis, see SCHLAG, *supra* note 14, at 25-26 (arguing that in legal analysis, "the foreign criteria of reason such as coherence and consistency come to displace experience and perception").

115. This assumption is rarely articulated, but it is immanent in a great deal of discussion about what lawyers do. To take just one example, the ABA has noted that large firms use paralegals "largely for such routine tasks as conducting *factual research*, proofreading documents, maintaining client files and monitoring deadlines." Mark Hansen, *Legal Secretary or Lawyer Lite: Growing Use of Paralegal Raises Questions about Their Function*, A.B.A. J., Jan. 1999, at 90 (emphasis added). The importance to the legal profession of focusing only on areas that ostensibly require specialized knowledge extends at least as far back as Lord Coke, who claimed before King James I that legal reasoning is not merely "natural reason," but "artificial reason." Smith, *supra* note 27, at 1050-51.

116. This is not to say, of course, that there is not great anxiety among lawyers, judges, and scholars about the "rationality" of such finders of fact. To the contrary, such anxiety is manifested in the existence of rules of evidence and in wresting away fact-finding from lay juries through such mechanisms as summary judgment and judgments notwithstanding the verdict. See GEERTZ, *supra* note 24, at 171-72 (discussing the "general wariness about how information is assessed in court" when "this assessment is given to amateurs to accomplish"). For a discussion contrasting the constraints placed on fact-finding by juries with fact-finding by attorneys in ethical decision-making, see *infra* text accompanying note 135.

117. The work of Anthony G. Amsterdam has been especially compelling in this regard. See, e.g., Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994); Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child* in Brown, 68 N.Y.U. L. REV. 226 (1993); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.U. L. SCH. L. REV. 55 (1992). See also Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

Finally, “law” has long been associated with “text,” and especially written rules. The examination of written rules is a textual enterprise; while there might be debate about what a rule means, there can be no disagreement about what a rule says. This gives at least the appearance of determinacy. In contrast, “facts” are, by their nature, extra-textual; “what happened” is never merely a written text, but an open aggregation of impressions, emotions and interactions, as well as a range of written documents that may include, among other things, contracts, letters, notices, or transcripts. This extratextuality is far more challenging to examine and far less subject to the appearance of a systematic, orderly analysis than written rules.<sup>118</sup> The open texture of facts therefore renders conventional legal analysis of limited utility.

## II. THE PROCESS OF FACT-FINDING IN ETHICAL DECISION-MAKING

Thus far, I have explored how ethics discourse submerges and marginalizes fact-finding. In this section, I offer an affirmative set of ideas about the crucial and complicated role that fact investigation and fact-finding play in ethical decision-making.

### A. *The Construction of Facts as Controlling Results*

The interpretation of facts may dictate a given result or dissolve ethical problems entirely.<sup>119</sup> This is because the application of every rule requires a factual predicate, and whether or not the factual predicate exists controls the result under a given rule.<sup>120</sup> For example, if an attorney must “take reasonable remedial measures” when a client has committed perjury,<sup>121</sup> a finding that either a client has not committed perjury or that it is unclear whether a client has committed perjury dissolves the ethical dilemma. This renders moot the question of what “reasonable remedial measures” to take.

Thus, the most incisive, comprehensive, and sensitive interpretation of applicable rules, even if undertaken by the attorney equivalent of Ronald Dworkin’s Judge Hercules—a figure “of superhuman intellectual power and patience”<sup>122</sup>—is powerless if fact-finding fails to establish the factual predicate necessary to bring a given rule into play. In this sense, fact-finding is the *deus ex machina* of ethical decision-making.<sup>123</sup>

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118. Indeed, the rise of professional codes led to the emergence of legal ethics as an academic discipline. Rhode, *Pervasive Method*, *supra* note 10, at 34; Pearce, *supra* note 6, at 722.

119. See Tremblay, *supra* note 46, at 29 (alluding to how, in practice, “whether there even is a problem [of ethics] is often an open question”).

120. See *supra* text accompanying note 21.

121. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (1990).

122. RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

123. The legal realists also recognized the extraordinary impact of facts on judicial decision-making. See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 213 (David Kairys ed., 1990). Interestingly, the realist critique tended to refer to “facts” as

### B. Fact-Finding as an Interpretive Act

Fact-finding is an act of interpretation.<sup>124</sup> If "[t]he central lesson of legal realism for lawyers is that there will often be a range of credible interpretations of the meaning of a given legal rule,"<sup>125</sup> imagine the interpretive challenge when the "text" is not merely a legal rule, but an array of meanings constructed through inferences from a multiplicity of sources.

Psychologists have revealed cognitive lenses that inevitably come into play when attorneys interpret facts.<sup>126</sup> Mental shortcuts or "heuristics" shape and filter what would otherwise be overwhelming sensory input when humans construe situations.<sup>127</sup> Examples include the "fundamental attribution error," through which "people tend to attribute their own actions to situational factors . . . and the actions of others to stable personality traits";<sup>128</sup> a general tendency "to favor explanations involving only one causal factor, even when

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the socioeconomic context from which cases (and judges) arose, not facts in the sense of "what happened" in a given case. See, e.g., Cohen, *supra* note 108, at 810 (noting the importance of "economic, sociological, political, or ethical questions" in resolving questions of law); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, 3 (1986) (legal realism sought "to understand law in terms of its factual context and economic and social consequences").

124. Wilkins, *supra* note 9, at 482 ("Confronted with the same factual material, various legal actors may easily reach different conclusions about the significance of a series of events."); Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 *LAW & CONTEMP. PROBS.* 5, 7 (1995) ("lawyers in everyday practice are called upon to help clients arrange their future affairs in dynamically changing situations where the facts, as well as the law, are anything but determinate"). Even the Model Rules of Professional Conduct recognizes that "a lawyer often has to act upon uncertain or incomplete evidence of the situation." MODEL RULES OF PROF'L CONDUCT R. 1.2 (1990).

125. Wilkins, *supra* note 9, at 511-12.

126. Donald C. Langevoort in particular has explored some of the psychological dynamics at play when attorneys confront issues of ethics. See, e.g., Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility For Clients' Fraud*, 46 *VAND. L. REV.* 75, 95-96 (1993); Donald C. Langevoort, *Ego, Behavior, and Law*, 81 *VA. L. REV.* 853, 860-65 (1995). For a general review of psychology and legal scholarship, see Langevoort, *supra* note 113.

127. Two leading studies of these processes are RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980) and DANIEL KAHNEMAN & AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982). Cognitive shortcuts are inevitable among all humans and thus distinct from different personalities or styles of reasoning, which might also influence how attorneys construe facts. See Rachlinski, *supra* note 113, at 740; Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 *AM. U. L. REV.* 1337 (1997) (gathering empirical research on the personality traits and styles of moral reasoning of pre-law students, law students, and lawyers).

128. See Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 *WASH. L. REV.* 526, 548 (1994); Lee Ross, *The Intuitive Psychologist and His Shortcomings*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 174, 184 (Leonard Berkowitz ed., 1977).

seeking the cause of complex events";<sup>129</sup> a general tendency to overestimate the normalcy of our own experience, that is, the assumption that the experience of others is similar to our own;<sup>130</sup> difficulty representing and holding in mind uncertainties;<sup>131</sup> and a tendency called "confirmation bias," through which we "manage knowledge in a variety of ways to promote the selective availability of information that confirms judgments already arrived at."<sup>132</sup> In the context of ethical decision-making, these heuristics inevitably influence how attorneys construe situations that implicate an ethical analysis.<sup>133</sup> Moreover, these processes are largely invisible: as a matter of cognition, "people fail to recognize the degree to which their interpretations of the situation are just that—constructions and inferences rather than faithful reflections of some objective and invariant reality."<sup>134</sup>

Although these cognitive processes remain relatively little known in legal discourse and procedure, one adjudicative procedure—trial by jury—does at least recognize the extraordinary interpretive challenge of fact-finding. The norms, rules and procedures of trial practice are brimming with fears of potential biases, inaccuracies, and uncertainties in fact-finding. Elaborate voir dire procedures hope to root out juror bias. Intricate rules seek to identify evidence that is reliable and probative enough for jurors to hear. Departures from the norms and rules, if egregious enough, warrant mistrials and new trials before fresh juries. Jurors are ordered not to discuss cases outside of trial or

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129. Brest & Krieger, *supra* note 128, at 548.

130. Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, in 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 319, 337-338 (Mark P. Zann ed., 1991).

131. Langevoort, *supra* note 113, at 1504 (people "have a strong preference for the elimination of uncertainty"); Lopucki, *supra* note 25, at 1521 ("cognitive systems have difficulty representing indeterminacies").

132. Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603, 606 (1980). In legal scholarship, the plasticity of memory has been of particular interest to those addressing trial testimony by eyewitnesses. See ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY 47-74 (1987).

133. See, e.g., Brest & Krieger, *supra* note 128, at 546 (lawyers, like all human beings, "tend to . . . filter perception through the sieves of schemes, stereotypes, and theories, which let in confirming data but re-interpret or exclude data that do not conform to our prior expectations"); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 685-86 (1994) ("professionals' recognition of ethical problems" is affected by "cognitive conservatism," through which attorneys "are more likely to register and retain information that is compatible with established beliefs or earlier decisions").

134. LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 85 (1991). See also CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 9 (1973) ("what we call our data are really our own constructions of other people's constructions of what they and their compatriots are up to").

with other jurors until the conclusion of trial, and, in some instances, judges will order that jurors be sequestered.<sup>135</sup>

Fact-finding by juries thus generates an enormous investment of time and resources and a rich, detailed analysis. This is in marked contrast to the largely invisible process through which lawyers conclude what the facts are for purposes of ethical decision-making.

### C. *The Complexity and Uncertainty of Facts*

Fact-finding is not only an act of interpretation, but also an extraordinarily difficult and inexact act of interpretation.

A striking feature of ethical decision-making in practice is that people enter the ethics picture not as the cardboard villains of fact hypotheticals, but as individuals or (in the case of business organizations) as entities composed of individuals. Flesh and blood people are full of contradictory motivations, indecisiveness and complexity.<sup>136</sup> At the foundation of many classic ethics problems lies the not-so-simple question of construing motivations and actions of human beings. When this task is further placed in the context of the inferences that must be drawn from numerous sources in order to construe situations, interpreting “facts” becomes, in many respects, the preeminent characteristic—and the preeminent difficulty—of ethical decision-making.

Consider, for example, Ms. Cooper’s case.<sup>137</sup> In order to engage in ethical decision-making, you must interpret “the situation.” The situation involves construing Ms. Cooper’s degree of substance abuse. This is a complicated business. She might be a substantial and continuing drug abuser and thus lying to get benefits (the most likely interpretation if Ms. Cooper’s case were to become an example of the “client perjury problem”). However, she also might be laboring under a mental impairment, including memory loss, or she might be “telling the truth” as she sees it by creatively characterizing a continuing problem that, as is often the case with substance abuse, ebbs and flows over time. In addition, any interpretation would be informed not only by what Ms. Cooper says, but also by a review of pertinent medical records that might be ambiguous or incomplete, as well as by interviews with potential witnesses. Your “interpretation,” therefore, is informed by a series of sub-interpretations

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135. Of course, rules of evidence also apply in bench trials, but fears about the integrity of the fact-finding process in bench trials are allayed through constructs like judicial “neutrality” and lack of bias. See *infra* text accompanying notes 167-68.

136. See, e.g., Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731 (1993); Robinson, *supra* note 39, at 153; Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43 (1991). The tendency to ascribe stable, negative character traits to clients might be an example of the “fundamental attribution error” that I previously described. See *supra* text accompanying note 128.

137. See *supra* text accompanying notes 18-21.

of your conversations with Ms. Cooper, medical records, statements by other witnesses, and other sources which define what “a case” is.

Another illustration in a very different context involves Charles Keating and the Lincoln Savings & Loan Association.<sup>138</sup> A prominent New York law firm, Kaye, Scholer, Fierman, Hays & Handler (Kaye Scholer), represented Lincoln and its parent, the American Continental Corporation, during an investigation of their financial practices by the Office of Thrift Supervision (OTS). OTS later charged Kaye Scholer with failing to disclose material facts to bank regulators and misrepresenting its clients’ financial practices, thereby violating an array of statutes, agency regulations, and rules of ethics.<sup>139</sup> After issuing informal responses to the OTS charges,<sup>140</sup> the firm settled for forty-one million dollars prior to formal proceedings and six days after OTS issued a “freeze” order that restricted the firm’s finances.<sup>141</sup>

This case has generated substantial commentary about whether Kaye Scholer acted ethically in representing its clients and whether OTS acted properly in pressing its case against Kaye Scholer.<sup>142</sup> Despite an at best

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138. Keating was Chairman and CEO of American Continental Corporation, of which Lincoln Savings and Loan was a wholly-owned subsidiary. *Lincoln Sav. and Loan Ass’n v. Wall*, 743 F. Supp. 901, 906-07 (D.C. 1990). Keating was subsequently prosecuted and convicted in state and federal court for a range of securities law violations and began serving substantial concurrent sentences. The Ninth Circuit later reversed his federal convictions, after which Keating pled guilty and, pursuant to a plea agreement, was sentenced to time served. *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998). The Ninth Circuit also overturned Keating’s state conviction. *Keating v. Hood*, 191 F.3d 1053 (9th Cir. 1999). In the end, Keating served five years in prison. *Id.* at 1055.

139. Given that OTS stood in the shoes of Lincoln and thereby became Kaye Scholer’s client, OTS also charged Kaye Scholer with malpractice. Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, The Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 994-95 (1993). For summaries and analyses of the complex series of transactions cited in the OTS charges, see *id.* at 988-1000, and Simon, *supra* note 61, at 247-58. The OTS charges are reprinted in their entirety in Mary C. Daly, *Lawyering After Kaye, Scholer: Preventing the Problems Before They Arise*, in *THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER*, at 235-322 (PLI Corp. Law and Practice, Handbook Series No. 779, 1992).

140. Kaye Scholer’s response is reprinted in STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 772-78 (1989).

141. See Curtis, *supra* note 139, at 989. See also Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53 (1993); Simon, *supra* note 61, at 244.

142. See, e.g., Symposium, *From the Trenches and Towers: The Kaye Scholer Affair*, 23 L. & SOC. INQUIRY 243 (1998); Symposium, *In the Matter of Kaye, Scholer, Fierman, Hays and Handler: A Symposium on Government Regulation, Lawyer’s Ethics, and the Rule of Law*, 66 S. CAL. L. REV. 977 (1993); Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395 (1993); Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings after the Kaye Scholer Settlement*, 25 ARIZ. ST. L. J. 487 (1993); Curtis, *supra* note 139, at 1011-14.

fragmentary and ambiguous factual record,<sup>143</sup> many commentators, in the usual fashion of ethics discourse, simplify facts by casting the Kaye Scholer lawyers either as greedy opportunists who turned a blind eye to unmistakable and blatant client fraud, or as lawyers of integrity who, in the best traditions of the profession, zealously represented their clients.<sup>144</sup>

However, the task facing Kaye Scholer in construing the “facts” was a complicated one. Kaye Scholer lawyers would have been faced with interpreting multiple and sometimes conflicting sources of information, including, among other things, construing representations by its clients which, in turn, involved representations by Keating and by lower echelon employees,<sup>145</sup> examining public and private documents on a complex series of financial transactions in light of these representations,<sup>146</sup> construing the regulatory and business climate at the time<sup>147</sup> and interpreting statements and reports by the clients’ accountants.<sup>148</sup> In light of these varied sources of information, one commentator concluded that a plausible interpretation of what was happening at the time is that:

Keating was an aggressive banker who liked to go close to the line of legality and might from time to time have crossed it. He was not particularly sensitive to conflicts of interest so far as Lincoln’s money was concerned. But he was

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143. Simon, *supra* note 61, at 283 (characterizing the factual record as “fragmentary and sometimes obscure”).

144. At least two commentators have noted the cartoonish way that facts are described in most writings on the affair. See Curtis, *supra* note 139, at 986 (characterizing the actions of Kaye Scholer as “fuzzier” than the typical “clear-cut” versions of the story, with “the heroes and villains . . . in stark relief”); Simon, *supra* note 61, at 259-67, 277 (detailing how ethics discourse “evaded” the allegations against Kaye Scholer and characterizing both sides of the debate as engaging in “conclusory, moralistic denunciations”).

145. For its part, Kaye Scholer, in its unofficial “response” to the OTS charges, asserted that it justifiably relied on the representations of its clients and accountants as to the legitimacy of its clients’ business practices. See, e.g., GILLERS & SIMON, *supra* note 140, at 776-77; Simon, *supra* note 61, at 286; Curtis, *supra* note 139, at 992. In order to support its own claims, OTS charged that “Kaye Scholer held numerous meetings with Lincoln officials, employees [and] affiliates.” Daly, *supra* note 139, at 246.

146. As is often true in allegations of financial fraud, the Kaye Scholer lawyers not only had to interpret what documents said, but also had to construe the validity of dates and signatures on documents in light of assurances by client employees that the documents were genuine. Simon, *supra* note 61, at 284.

147. This background is itself a complicated issue, especially given that the subsequent Savings and Loan debacle has tended to color perceptions of what Congress, regulators and attorneys should have known before the full extent of the debacle became apparent. *Id.* at 276-80 (exploring the contemporaneous motivations of Congress and bank regulators).

148. Arthur Anderson and Arthur Young issued opinions about some of the transactions in question. GILLERS & SIMON, *supra* note 140, at 776-77; Curtis, *supra* note 139, at 992. The subsequent resignation of Arthur Anderson and Kaye Scholer’s representations about the resignation in a SEC filing constituted one of the disputed charges against Kaye Scholer. See Daly, *supra* note 139, at 252-57; Simon, *supra* note 61, at 284-86.

also talented, and running a largely legitimate institution whose problems were mostly caused by difficult marketplace and regulatory circumstances. Client officials had justifications and excuses for everything they were doing. Keating was being targeted aggressively by the Bank Board, not without reason, but maybe without a balanced understanding of context.<sup>149</sup>

This is not to suggest that Keating did not commit wholesale fraud<sup>150</sup> or that the Kaye Scholer lawyers acted properly in representing its clients.<sup>151</sup> What I am suggesting is that the complexity inherent in divining client motives and circumstances demonstrates the profound challenges at the core of attorney fact-finding.

#### *D. The Development of Facts as an Interactive and Discursive Process*

Ethical decision-making is an interactive and discursive process that occurs over time.<sup>152</sup> What an attorney can or should do as a matter of ethics is

149. Donald C. Langevoort, *What Was Kaye Scholer Thinking?*, 23 L. & SOC. INQUIRY 297, 301 (1998). In light of this interpretation, Langevoort notes that Keating's actions were "fluid and ambiguous." *Id.*

150. Although the Ninth Circuit eventually overturned Keating's federal and state convictions on constitutional grounds, he entered into a plea bargain through which he was sentenced to time served. See *supra* note 138. This ironic coda to the Lincoln saga means that Keating was never convicted in a trial that was not tainted by constitutional violations. See Simon, *supra* note 61, at 244 (stating "The legality of Keating's conduct was then—and in some respects remains today—a matter of dispute."). Nevertheless, at a minimum, it seems likely, as one court found, that Lincoln's principals "did engage in numerous unsafe and unsound banking practices." *Lincoln Sav. and Loan Ass'n v. Wall*, 743 F. Supp. 901, 906 (D.C. 1990) (affirming OTS's appointment as Lincoln's receiver and conservator).

151. Given the complexities of the situation and the spotty factual record, other conclusions about Kaye Scholer's conduct are certainly plausible. For example, William Simon has concluded that if the Kaye Scholer response to the OTS charges is "assumed to be factually accurate," there remain "standing at least some of the concerns raised by the [OTS] charges." Simon, *supra* note 61, at 245. Nevertheless, Simon also admits that "[w]e do not know enough to pass confident judgment on Kaye Scholer's performance in the Lincoln case." *Id.* at 282. In any event, the Kaye Scholer case continues to raise important normative questions as to the degree to which attorneys have a duty to investigate and disclose client wrongdoing. For a discussion of the impact that my general analysis has on the continuing examination of this question, see *infra* text accompanying notes 232-36.

152. For a detailed philosophical argument in favor of a dialogic view of ethical decision-making that draws upon ideas from Jurgen Habermas's theory of "communicative ethics," see Kupfer, *supra* note 28. However, Kupfer's work, like other discussions of the importance of dialogue to moral reasoning, tends to conceptualize dialogue in the sense of discussing ethical problems directly with clients and others, not dialogue as a component of fact-finding and fact investigation. See, e.g., LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 167, 174 (alluding to "moral dialogue" to change the client's moral stance, as well as the possibility that it will be "the lawyer rather than the client who will eventually modify her moral stance"); Ted Schneyer, *Moral Philosophy's Standard Misconceptions of Legal Ethics*, 1984 WIS. L. REV. 1529, 1564 (alluding to the importance of moral dialogue with clients); John Ladd, *The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion*, in PROFESSIONAL ETHICS ACTIVITIES



invariably bound up with a fluid set of meanings ("the facts") developed through interactions that attorneys have with clients and others.<sup>153</sup>

This quality of fact-finding is in contrast to the analytic world typical of rule interpretation. While legislatures or judges may modify the interpretation of rules, a rule tends to exist outside of time. This aspect of rule interpretation has infected conceptions of facts in ethical decision-making. Ethics discourse typically presents facts in narrative form, and then the clock stops, or rather disappears, as the proper interpretation and application of a rule is explored. Discussion and analysis take place in a timeless space where the rule *is* or *should be* and the facts *are*.<sup>154</sup>

The example of Ms. Cooper illustrates the interactive and discursive quality of fact-finding.<sup>155</sup> There are multiple possibilities and discursive strategies that you may consider to explore whether Ms. Cooper is or is not telling the truth about her substance abuse. Ms. Cooper's mental impairments may have produced memory lapses, but how do you bring up such a sensitive subject? Perhaps you can delicately ask if she has had any problems with her memory as a result of her mental and physical conditions, or consider whether she has been inconsistent on other, less critical points, thereby suggesting a more generalized memory impairment. If you believe that this explanation is unlikely or uncertain, you could also choose to explore with Ms. Cooper a range of ways of presenting the issue to the judge under different facts as a means to help her feel "safe" in being more candid with you, if, in fact, candor is an issue. You could, for example, suggest that if her substance abuse has

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IN THE SCIENTIFIC AND ENGINEERING SOCIETIES 154 (Chalk et al., eds., 1980) ("[E]thics itself is basically an open-ended, reflective and critical intellectual activity" that cannot "be settled by fiat, by agreement or by authority."). One social scientist that has explored moral development from a dialogic/interactional viewpoint is Norma Haan. See, e.g., Norma Haan, *Moral Development and Action from a Social Constructivist Perspective*, in 1 HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 251 (William M. Kurtines & Jacob L. Gewirtz eds., 1991); Norma Haan, *The Interactional Morality of Everyday Life*, in SOCIAL SCIENCE AS MORAL INQUIRY 218 (Norma Haan et al. eds., 1983).

153. Although largely unexamined for many years, a growing literature has explored issues surrounding attorney-client discourse both generally and in specific contexts. See, e.g., William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Robinson, *supra* note 39, at 153-59; Ann Shalleck, *Theory and Experience in Constructing the Relationship Between the Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541 (1995); Gay Gellhorn et al., *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLINICAL L. REV. 245 (1994).

154. This analytic world embodies the assumption of "constancy of the world" that is a deep-seated Western assumption. See *supra* text accompanying notes 106-08. The excerpt from the work of David Luban that I critiqued earlier also reflects this atemporal view. See *supra* text accompanying note 72.

155. See *supra* text accompanying notes 18-19.

significantly trailed off, the issue can be presented to the Administrative Law Judge as “under control” or “dramatically reduced.” Or if she has not engaged in substance abuse for the past week or the past month or the past six months, the issue can be presented to the Administrative Law Judge as having “ended.” Of course, it is impossible to play these suggestions out in detail because each of these discursive choices would be followed by other choices about what to do in light of the client’s response.

These choices are difficult, challenging and intensely contextual. An appropriate ethical response warrants understanding the status of the attorney-client relationship and the possible impact or impacts of such an inquiry on the relationship. More importantly, the thoughtfulness and sophistication of these choices profoundly influence the quality of the ethical practice being conducted. In this sense, attorney-client interactions—and the choices that influence those interactions—constitute in a fundamental way the essence of an “ethics problem.”

#### *E. The Interplay of Facts and Law in Ethical Decision-Making*

It is generally a given that facts and law are discrete and severable and that, therefore, an ethical rule has meaning distinct from facts.<sup>156</sup> This assumption makes the rule-based emphasis of ethics discourse meaningful: one can learn something about rules *qua* rules by thinking through how rules apply in different situations, and this enterprise only makes sense if rules have meanings independent of the situations that bring them into play.<sup>157</sup>

Such dualism is subject both to a theoretical critique and an empirical critique. In terms of theory, neither rules nor facts can be meaningful without the other. Rules are shells of abstraction without factual content to fill the abstraction. This is hardly a radical idea; it informs commonplace notions of how courts can only decide “concrete cases and controversies”<sup>158</sup> and the reliance on the case method in legal education.<sup>159</sup> As to facts, the infinite number of stories and inferences that can be constructed from life’s circumstances—indeed even the identification of a “situation” as a “situation”

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156. See *supra* text accompanying notes 22-34.

157. See *supra* text accompanying notes 109-14. One critique of this distinction in ethics discourse is that merely learning rules is not enough; one must learn to *apply* them as well. See, e.g., David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 639 (1983). However, to speak of “rule application” continues to elevate the importance of rules over facts; rules are applied once the facts are known.

158. This requirement derives from Article III of the Constitution. See generally Lea Brilmeyer, *The Jurisprudence of Article III: Perspectives on the “Case” or “Controversy” Requirement*, 93 HARV. L. REV. 297 (1979).

159. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 52 (1983) (quoting Christopher Columbus Langdell’s justification of the case method as mastering principles in “the ever tangled skein of human affairs”).

that implicates ethics or law—must be shaped by something, and under the Anglo-American system that something is rules. Put another way, rules give shape to facts by identifying what is relevant among an array of potentially relevant circumstances. All of this produces a circularity in which both rules and facts are interpreted in light of the other.<sup>160</sup> Such circularity is not a critique of conventional legal analysis, but a description of how the process is fundamentally constituted.<sup>161</sup>

Apart from theory, empirical studies exploring moral decision-making in general and ethical decision-making by attorneys in particular suggest that rigid rule/fact dualism does not reflect how ethical decision-making takes place in the field. Deborah Rhode has noted that “a half-century of behavioral research underscores the variability and contextual nature of moral behavior: a single incident or small number of acts committed in dissimilar social settings affords no basis for reliable generalization.”<sup>162</sup> “Social settings” include such things as “exposures to temptation, client pressures and collegial attitudes in his practice setting.”<sup>163</sup> Indeed, one researcher recently has found that ethical decision-making “is a complex phenomenon and varies from situation to situation,” and that attorneys “base their decisions on different rationales in

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160. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 146-52 (1991). This point has also been made in the context of judicial decision-making. See, e.g., Jan M. Van Dunne, *Narrative Coherence and Its Function in Judicial Decision-Making and Legislation*, 44 AM. J. COMP. L. 463, 465 (1996) (critiquing a “dichotomy” between “norms and facts” because “[f]acts are formed by norms, that is, selected in anticipation of existing norms, and, vice versa, norms are formed by the facts presented for a decision”).

161. This process recalls Hans-Georg Gadamer’s influential notion of the “hermeneutic circle”: “[A] fundamental principle of understanding [is] that the meaning of the part can be discovered only from the context—i.e., ultimately from the whole . . . . [T]his is a logically circular argument, insofar as the whole, in terms of which the part is to be understood, is not given before the part . . . .” HANS-GEORG GADAMER, *TRUTH AND METHOD* 190 (1994). This idea is also implicit in some approaches to meaning prevalent in China in which “the part cannot be understood except in relation to the whole.” Peng & Nisbett, *supra* note 107, at 742.

162. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 560 (1985) [hereinafter Rhode, *Moral Character*]. See also Rhode, *Pervasive Method*, *supra* note 10, at 45-48; Menkel-Meadow, *supra* note 4, at 97 (empirical studies of ethical decision-making by attorneys suggest that “ethical dilemmas should be seen as situational and contextual”); LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 117 (“Our moral judgment of a particular act is highly sensitive to contextual factors—intangibles about particular people or idiosyncrasies in the facts—that drop out of consideration when we abstract from the act to the general policies underlying it.”). See also Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, in *HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT* 45 (William M. Kurtines & Jacob L. Gewirtz eds., 1991) (“Situations with moral implications contain many decisional ingredients that may be given lesser or greater weight depending upon the standards by which they are cognitively processed and the particular constellations of events in given moral predicaments.”).

163. Rhode, *Moral Character*, *supra* note 162, at 559.

different settings.”<sup>164</sup> In another study in which lawyers were interviewed about ethics, lawyers “tended to discuss and define ethics from a ‘situational’ standpoint.”<sup>165</sup>

In sum, what Robert Cover called the “thick contextuality” of “moral situations”<sup>166</sup> suggests that the idea of a rigid boundary between facts and law misleadingly simplifies the processes of ethical decision-making.

#### F. *The Situated Attorney as Finder of Fact*

Attorneys are situated in a swirl of events as they wrestle with problems of ethics, and this swirl of events inevitably influences how attorneys construe the circumstances at issue. As a result, an investigation of the many pushes and pulls of practice is critical to an understanding of attorney fact-finding.

##### 1. The Pressures of Practice

An ideal judge is set apart administratively, ethically and even physically from the matter to be adjudicated.<sup>167</sup> This norm of judicial isolation and “neutrality” is so central to adversarial adjudication that every canon of judicial ethics is, at bottom, an entailment of this one idea.<sup>168</sup>

164. Susan Daicoff, (*Oxymoron?*) *Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 FLA. L. REV. 197, 247 (1995). Interestingly, Daicoff found that attorneys applied “personal values” or ethical rules in varying ways depending on the specifics of the situation presented. *Id.* at 231. This flexibility contrasts with the more rigid positions characterizing academic debates about the legitimacy of “personal values” in ethical decision-making. *Id.* at 231-32.

165. Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 746 (1998). Messikomer notes that while such lawyers typically noted that they “work within . . . the ethics of a particular situation,” the content of what they meant was not clear. *Id.* at 746-47.

An interesting implication of the “situational” nature of ethics problems relates to cultural conceptions of “ethics” and “morality.” It is generally assumed that a person’s “ethics” are a matter of choice. After all, a person is not “unethical” by accident. This understanding appears to reflect a general cognitive tendency “to overestimate the influence of dispositional factors in explaining another person’s behavior, at the expense of situational influences.” Langevoort, *supra* note 113, at 1504. These understandings and tendencies thus appear to combine to promote the idea that ethics is bound by rules and norms, the violations of which are attributable to a defect of character. It would be more difficult to condemn decisions as reflections of immoral dispositions when ethical problems are viewed as more “situational” and subject to interpretation.

166. Robert Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 n.7 (1983).

167. See, e.g., Jack Weinstein, *Limits on Judges’ Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 5 n.16 (1994) (alluding to the ideal of “a detached magistrate presiding over a dispute in which he or she has neither personal interest nor predisposition”).

168. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2000) (“A Judge Shall Uphold the Integrity and Independence of the Judiciary”); Canon 2 (“A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities”); Canon 3 (“A Judge Shall Perform

In contrast, attorneys engaged in ethical decision-making are, by definition, wholly immersed in the circumstances giving rise to ethical problems.<sup>169</sup> The paradoxical role that attorneys play as participant/decision-makers in ethical decision-making is crucial to understanding the complexities of this process. This role means that attorneys have a personal and professional stake in how problems of ethics are resolved. Given that the interpretation of facts controls results, attorneys may generate—albeit for the most part subconsciously—the most attractive result through a plausible interpretation of facts that leads to that result.<sup>170</sup>

This is not to say that lawyers are driven solely by broadly defined “self-interest;” rather, like clients, lawyers are complicated and subject to many, sometimes contradictory, motivations. There are a number of pressures that might come into play.

*Economic Pressure.* Economic pressures may determine how ethical issues are resolved.<sup>171</sup> For example, attorneys who raise ethical issues with

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the Duties of Judicial Office Impartially and Diligently”); Canon 4 (“A Judge Shall So Conduct the Judge’s Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations”); Canon 5 (“A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity”). This is not to say, of course, that judges do not operate under significant institutional, economic, or psychological pressures of their own. See generally Robert Robinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3 (1996). However, at least at the theoretical and formal level, the obsession with judicial “neutrality” markedly contrasts with the absence of such constraints on ethical decision-making by attorneys.

169. Judges do sometimes engage in decision-making about themselves when construing the Code of Judicial Conduct and recusal statutes. See MODEL CODE OF JUDICIAL CONDUCT Canon 3E (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”); Seth E. Bloom, *Judicial Bias and Financial Interest As Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 665-80 (1985) (reviewing federal disqualification statutes). In such instances, judges are finders of law and fact in cases where their own behavior is at issue. See John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243-44 (1987) (discussing the self-interest of judges in construing whether they should be disqualified for bias). This type of decision-making might well involve comparable processes to those I describe for attorneys. However, judicial decision-making only rarely entails judges construing their own behavior; rather judges virtually always decide the merits of litigants’ claims in which they are uninvolved.

170. See, e.g., Rhode, *Moral Character*, *supra* note 162, at 558-59 (explaining that ethical decision-making is heavily influenced by “exposures to temptation, client pressures, and collegial attitudes”); Schneyer, *supra* note 152, at 1580 (ethical decisions by attorneys are often the result of financial, psychological or organizational pressures and not because of legal ethics); Rachlinski, *supra* note 39, at 752 (“[P]eople construct preferences on the spot to suit mentally available desires in any given context” and such “preferences fluctuate.”).

171. Wilkins, *supra* note 9, at 512 (“[T]here will often be substantial economic incentives for lawyers to choose one interpretation of legal merit over another” in ethical decision-making.).

clients risk prompting clients to take their business elsewhere,<sup>172</sup> and attorneys who raise ethical issues with senior attorneys risk being fired or hounded out of the profession.<sup>173</sup>

*Institutional Pressure.* It often is in a lawyer's interest to maintain good relations with non-clients in order to adequately represent future clients and to make one's professional life manageable. For example, one study found that "defense lawyers are understandably tempted to sacrifice individual clients, or even their clients as a class, in order to maintain good personal relations with prosecutors, police, and court and jail personnel."<sup>174</sup>

*Collegiality.* Lawyers often feel compelled to maintain collegial relations with fellow lawyers.<sup>175</sup> This impulse may derive from the impulse to "fit in" or the need to foster good relations in a small legal community in order to obtain referrals of future clients.<sup>176</sup> For example, an attorney might fear alienating a fellow lawyer by construing a potential "whistleblower" situation as triggering a reporting requirement to disciplinary authorities,<sup>177</sup> or fear pressing a client's substantive or procedural advantages and thereby risk antagonizing fellow lawyers in a small community or practice area.<sup>178</sup>

172. An example is the story of OPM Leasing, which engaged in an ongoing series of fraudulent transactions while being represented by attorneys. OPM "represented more than half the firm's annual billings," and some have argued that the obvious economic interest in retaining a lucrative attorney-client relationship led the firm to continue its representation despite suspicions of client wrongdoing. Luban, *supra* note 91, at 957-58. See also PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITY OF LAWYERS: CASE STUDIES* 184-97 (1988). For a more detailed discussion of the OPM matter, see *infra* text accompanying notes 256-61.

173. This fear proved well founded in one case in which an associate was terminated after urging his firm to report the misconduct of a fellow associate. *Wieder v. Skala*, 80 N.Y.2d 628 (1992).

174. Schneyer, *supra* note 152, at 1544-55 (citing Abraham Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation a Profession*, 1 LAW & SOC'Y REV. 15 (1967)).

175. Rhode, *supra* note 133, at 681.

176. See DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 140-44 (1990).

177. Model Rule of Professional Conduct 8.3 (1999) holds that a "lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." As one commentator has put it, "[p]robably no other professional requirement is so widely ignored by lawyers subject to it." WOLFRAM, *supra* note 16, at 683. Although a number of reasons help explain this lack of compliance, a primary reason is likely "fear of retaliation." *Id.* at 683 n.17. See also Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999); Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2175 (1998). See also *Wieder v. Skala*, 80 N.Y.2d 628 (1992) (discussing associate attorney's termination from position in law firm after advocating that firm report ethical misconduct of another associate).

178. See LANDON, *supra* note 176, at 140-44.

*The Environment of the Workplace.* Attorneys practice in extraordinarily divergent environments. These environments—ranging from large elite law firms, in-house legal departments, solo practices, government agencies, public defender offices and civil legal services offices—inevitably influence ethical decision-making.<sup>179</sup> Moreover, individual firms also have “cultures,” and these cultures encourage lawyers to approach ethical decision-making in ways that conform to prevailing firm norms.<sup>180</sup>

*Workload.* When disembodied from practice, the work of ethical decision-making seems minimal. When placed in the context of overworked attorneys, however, ethics take time. Some of this is a function of the effort required to conduct legal research on ethical problems. Perhaps even more importantly, however, fact-investigation and applying rules to facts is time consuming: consider the extra work required to determine if a party is represented in a given matter,<sup>181</sup> working through suspicions of perjury with clients or witnesses<sup>182</sup> or filing a complaint against another attorney.<sup>183</sup> Such inquiries

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179. Douglas N. Frenkel, et al., *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697, 698 (1998); Wilkins, *supra* note 9, at 486-89, 512. My own practice experience included periods both as an associate with a large law firm and as a staff attorney with a small civil legal services office. The two experiences were radically different in every respect: the nature of the clients I served (large corporations versus indigent elderly people), the volume of cases (five or six cases versus eighty), the resources and support staff available to assist me in case development (substantial versus few or none) and the nature of the fora in which I typically practiced (federal court versus “poor people’s courts,” such as New York City’s Housing Court, which operates with minimal due process and little or no discovery). The crushing workloads, desperate clients, inadequate resources and understaffing typical of public defender and civil legal services offices cannot help but influence the manner in which attorneys grapple with questions of ethics. See, e.g., HEYMANN & LIEBMAN, *supra* note 172, at 69-105 (describing work in a public defender’s office). Similarly, the economics of firm practice carries its own pressures. See generally Lerman, *supra* note 177. Some commentators have recognized this diversity and have suggested that ethical rules be more finely tuned to different practice contexts. See *supra* text accompanying notes 41-45.

180. One first-person account by a law firm associate details billing practices ranging from the suspect to the outright fraudulent, all of which were viewed as norms within a particular firm’s culture. See Lerman, *supra* note 177, at 2175. Among the practices described by Lerman’s anonymous associate were: effective minimums of four-tenths of an hour for telephone conversations, *id.* at 2158; changing time billed by paralegals to time billed by attorneys, *id.* at 2162; billing conversations with colleagues about cases as “legal research,” *id.* at 2165; billing for time spent thinking about a case even if not in the office, such as while “mowing the lawn over the weekend,” *id.* at 2166. These practices were never explicitly articulated—“partners were very careful not to instruct us to do dishonest billing”—but were assimilated norms which were required in order to survive in the culture of the firm. *Id.* at 2158. But see Messikomer, *supra* note 165, at 755-58 (in interviews with criminal defense lawyers, notion of firm “culture” was “free-floating and amorphous rather than precise”).

181. See MODEL RULES OF PROF’L CONDUCT R. 4.2 (1999).

182. See *supra* text accompanying notes 153-55.

183. See MODEL RULES OF PROF’L CONDUCT R. 8.3 (1999).

can also destabilize relationships with clients, attorneys or judges, thereby increasing the time and effort required to represent a client. While it might seem that even significant expenditures of time are trivial when one's professional license or professional integrity are at stake, licenses and integrity can be protected more efficiently by simply interpreting situations as not calling ethical rules into play.<sup>184</sup>

*Personal Commitments to Clients.* Lawyers often experience feelings of loyalty, concern or responsibility towards clients.<sup>185</sup> These feelings might intensify given the profound impact that a lawyer's professional performance might have on the lives of clients. In this way, lawyers often confront ethical dilemmas in an intensely personal way, not in the bloodless, purely analytic sense of, for example, choosing between "the interests of third parties" and "interests of clients."<sup>186</sup>

Therefore, "real" clients—Ms. Cooper, for example—might trigger the emotions and passions of lawyers. The decision to disclose client confidences or to withdraw from representation becomes agonizing. Faced with the complex, uncertain task of construing whether Ms. Cooper lied, it is plausible—perhaps likely—that you will find that Ms. Cooper has not—or that you are not sure if she has.

## 2. The Judicial Role Versus the Attorney Role

The differences between the "neutral" stance of a judge and the participatory stance of the lawyer embody even more subtle yet significant distinctions between judicial decision-making and ethical decision-making by attorneys.

Judicial decision-making defines the judicial role; it is, after all, what makes judges judges. In contrast, attorneys are not only ethical decision-makers. Rather, the ethical practice of law is part of the texture of practice;

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184. See Rhode, *Pervasive Method*, *supra* note 10, at 45 (describing "time pressures" as one of the substantial factors influencing ethical conduct by lawyers); Langevoort, *supra* note 149, at 298 ("So who succeeds as a lawyer? Not the moral obsessive, the one who spots ethical issues everywhere and dwells on them with painstaking deliberation. In high-pressure settings like corporate law, that is debilitating and distracting from the demanding tasks at hand.").

185. See, e.g., Jane M. Spinak, *Reflections on a Case (Of Motherhood)*, 95 COLUM. L. REV. 1990 (1995) (describing the deep connections attorney felt as a mother towards her client in an adoption case).

186. David Luban alludes to a similar idea when he argues that "emotions are not just a complement to moral reasoning, they are a component of it." David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 899-900 (1999). See also Ellmann, *supra* note 40, at 2674 (discussing how "people in professional contexts do respond to the calls of affection, loyalty, sympathy"). Of course, lawyers sometimes make a concerted effort to impose professional limits on emotional attachments to clients. *Id.* at 2695-97. In addition, lawyers sometimes might not experience a personal commitment to clients but, conversely, a personal distaste for clients, which no doubt has its own influence on findings of fact.



ethics hums in the background, and ethical decision-making only rises to the surface when the interaction of interpreted facts and interpreted ethical rules threaten the norms of practice. The texture of practice therefore constitutes and is constituted by ethics, and practice is, at bottom, “solving (or making worse) problems of clients and others, under conditions of extraordinary complexity and uncertainty, in a virtually infinite range of settings.”<sup>187</sup> While judicial decision-making may involve the resolution of difficult questions of fact, the carefully protected isolation of the judicial role is utterly different from the shifting and uncertain factual matrix through which attorneys navigate.

Furthermore, within the adversary system, the judicial role is passive. A judge’s primary role is not to go out and find facts, but to interpret evidence found and presented by advocates or litigants. While judges also actively interpret facts,<sup>188</sup> lawyers—unlike judges—do not have facts presented to them; a primary challenge of lawyering is to develop facts through formal and informal investigation and to construct narratives that a decision-maker or adversaries will find persuasive.<sup>189</sup> This open-ended, creative process offers lawyers opportunities for construing facts in ways that are in line with the interests of clients. However, “[p]rofessional techniques for proving facts to others are insufficient for the purpose of deciding facts for ourselves” when resolving issues of ethics.<sup>190</sup>

### III. IMPLICATIONS FOR ETHICS SCHOLARSHIP AND PEDAGOGY

In the first section of this Article, I demonstrated that ethics discourse submerges the factual dimension of ethical decision-making. In the second section, I explored not only how fact-finding is at the core of ethical decision-making, but also how this largely hidden dimension implicates a rich array of processes and issues. In this final section, I integrate the elements of my preceding analysis and offer a preliminary view of what a fact-sensitive ethics scholarship and pedagogy would look like.

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187. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 317 (1995).

188. See Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric*, Judicial Writings, 62 U. CHI. L. REV. 1371 (1995); Robinson, *supra* note 168, at 4.

189. While especially true of trial lawyers, the construction of narratives is a critical dimension of appellate advocacy as well. See Anthony G. Amsterdam, *Thurgood Marshall’s Image of the Blue-Eyed Child in Brown*, 68 N.Y.U. L. REV. 226 (1993).

190. Hazard, *supra* note 21, at 139.

A. *The Integration of Legal Ethics into the Practice of Law*

A central implication of my analysis thus far has been that ethics discourse should better reflect the central role that fact-finding plays in ethical decision-making.

This, however, is at best only a half step. One could go further: the problem with fact formalism in ethics discourse is that it isolates ethics from the practice of law. Indeed, Part II of this Article describes not only fact-finding in ethical decision-making, but also fact-finding in the practice of law more generally. For example, a primary challenge generally facing practitioners is the fluidity and ambiguity of facts<sup>191</sup> which, in turn, often involves the interpretation of complex and ambiguous motivations and circumstances.<sup>192</sup> In practice, interpreting facts proceeds interactively and discursively over time.<sup>193</sup> Attorneys must interpret facts in light of rules and rules in light of facts, and thus rules and facts are interrelated.<sup>194</sup> Attorneys interpret facts through a perspective informed by a unique set of psychological, social and economic influences that shift over time.<sup>195</sup> While rule-based legal research and analysis has its place, it is only one dimension—and not always the most important one—of the practice of law. By viewing legal ethics as an isolated body of doctrine, ethics discourse severs ethics from practice and practice is the only place where legal ethics is meaningful.

Situating ethics discourse squarely in practice has normative implications as well. The message sent by ethics discourse is that when the time comes for ethical decisions to be made, facts are already “there.” By focusing instead on the inherent “thickness” of facts and the challenges of fact interpretation, ethics scholarship and pedagogy would encourage practitioners and students to view problems of ethics as embedded in the complex network of understandings that constitute legal representation. Ethical problems would then be a spur to revisit these understandings, and practitioners might find themselves not only

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191. See, e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 614-15 (1984); BINDER, *supra* note 160, at 19.

192. For examples of the complexities and contingencies of representation, see generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Spinak, *supra* note 185.

193. See, e.g., Robinson, *supra* note 39, at 153; Naomi Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2485-93 (1993); Shalleck, *supra* note 153, at 1032-33.

194. See, e.g., BINDER, *supra* note 160, at 146-52.

195. See Robinson, *supra* note 39, at 153; Shalleck, *supra* note 153, at 1032-33.

confronting problems of ethics with greater sensitivity, but also the challenges of legal representation with greater sensitivity as well.<sup>196</sup>

The challenge for participants in ethics discourse, therefore, is to integrate ethics into the world of practice. In the final sections below, I suggest some parameters and initiatives for such a newly integrated ethics discourse.

### B. *Implications for Ethics Scholarship*

A fact-centered ethics scholarship would reflect ethical decision-making in the context of representing clients and engaging in the practice of law. This new ethics scholarship would also build upon recent work that manifests dissatisfaction with prevailing ways of "doing ethics."<sup>197</sup> There are a number of ways to approach this new emphasis.

#### 1. *Beyond the Hypothetical*

Ethics scholarship that focuses on fact-finding should reduce its reliance on fact hypotheticals. As I have noted, fact hypotheticals virtually always define away fact-finding as meaningful to ethical decision-making.<sup>198</sup> To imagine an ethics scholarship free of fact hypotheticals is in and of itself a way to conceptualize a more textured, fact-centered way of approaching the field.

One hypothetical-free technique that has produced important insights—including insights that I have drawn upon in my preceding analyses<sup>199</sup>—involves interviewing attorneys, law students, clients or others about their

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196. The emphasis I am suggesting resonates with feminist scholarship that argues for an increased role of an "ethic of care" in legal ethics. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Menkel-Meadow, *supra* note 4; Ellmann, *supra* note 40; Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992). These perspectives also tend to put the locus of moral decision-making into the attorney-client relationship in contrast to the prevailing rules-focus of ethics discourse, although they do not conceptualize this in terms of the importance of facts and fact-finding.

197. See, e.g., Kupfer, *supra* note 28, at 36, 87 (critiquing "[t]he traditional approach to professional ethics" which relies on "general principles"; instead, ethical values should be determined through an "intersubjective" and "rigorous debate" among "all concerned persons"); Tremblay, *supra* note 30, at 492 (critiquing deductive models of "applied ethics" and arguing for the application of "casuistry," which is "a case-based, particularized, context-driven method of normative decisionmaking").

198. See *supra* text accompanying notes 70-71, 86-90. Even much of the existing empirical research on law students' and attorneys' ethical decision-making and moral reasoning typically employs instruments that record students' reactions to factual situations that are determinate. See, e.g., Daicoff, *supra* note 164, at 227 (methodology of study included a "questionnaire containing five professional ethical dilemmas"); Hartwell, *supra* note 11, at 511-12 (employing a testing instrument to measure moral development called "the Defining Issues Test" which "compris[es] six vignettes, each presenting a moral dilemma").

199. See *supra* text accompanying notes 165, 179-80.

experiences with real or simulated ethics problems encountered in practice.<sup>200</sup> Perhaps even greater insights can be generated by examining transcripts or videotapes of students or practitioners who are participating in simulations or, with appropriate consent and preservation of confidentiality, of students in law school clinics or practitioners involved in real cases.<sup>201</sup> This latter technique has especially great potential to capture the complexities I have been examining because it examines the details of interactions as they occur, and it resists the factual simplifications typical of other types of ethics discourse.

A superb and rare example of this type of scholarship is a study by William L.F. Felstiner and Austin Sarat of how power and responsibility are negotiated in interactions between matrimonial attorneys and their clients.<sup>202</sup> While the allocation of decision-making power between attorney and client is ostensibly governed by rules,<sup>203</sup> the factual content of the question—defining what clients want, how attorneys conceive of what clients want, how the needs of attorneys and clients are negotiated through their interactions—only has meaning when concretized in the give and take of actual representation. Felstiner and Sarat did concretize this question by observing and transcribing actual attorney-client interactions.<sup>204</sup>

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200. See, e.g., Messikomer, *supra* note 165, at 740-41 (analysis of meetings with lawyers and judges about “ethics and professional behavior”); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 213 (1991) (as part of study, researcher “encouraged” first-year law students “to define a moral conflict and discuss, in their own terms, the actions they took and the decisions they made in the moral conflict”). A related technique is to administer questionnaires to subjects instead of interviewing them directly. See Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271, 289-91 (1999) (empirical analysis of questionnaires administered to law students before and after simulated negotiation).

201. Some scholars have adopted this technique in areas other than ethics with students performing simulations. See, e.g., Gellhorn et al., *supra* note 153, at 251-55 (analysis of videotapes and transcripts of interviews of clinic students with actual clients seeking disability benefits); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and “Feminine” Style*, 66 N.Y.U. L. REV. 1635, 1655-58 (1991) (analysis of videotapes and transcripts of law students conducting a simulated initial client interview).

202. Felstiner & Sarat, *supra* note 153. For other descriptions of this research, see Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer’s Office*, 20 LAW & SOC’Y REV. 93 (1986); Austin Sarat & L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 YALE L.J. 1663 (1989).

203. Rules that come into play in this area are MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2001) (a “lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued”), and R. 2.1 (noting that lawyers “[i]n rendering advice may refer not only to law, but to other considerations such as moral, economic, social, and political factors”).

204. Felstiner & Sarat, *supra* note 153, at 1450 n.12. In addition, Felstiner and Sarat also attended judicial proceedings and mediations and interviewed lawyers and clients about their experiences. *Id.*

Felstiner and Sarat's fascinating conclusions resist easy summary because their methodology captured enormous complexity in how "power" plays out in attorney-client interactions. They found that not only did "power and resistance" on the part of lawyers and clients shift over time, but also that "it was often difficult to say who, if anyone, was 'in charge,' who, if anyone, was directing the case."<sup>205</sup> Both attorneys and clients sought to shape a case, and their continuing, divergent strategies to do so constitute what Felstiner and Sarat called ongoing "negotiations over reality and responsibility."<sup>206</sup>

This type of analysis can open up exciting possibilities in many areas of legal ethics. Consider, for example, issues relating to confidentiality—an area that is unusual in that ethics scholars and even the United States Supreme Court acknowledge a pressing need for "empirical" data about the impact (or lack thereof) of confidentiality on representation.<sup>207</sup> A study of attorney-client interactions could lead to a deeper understanding of how attorneys interact with clients about confidentiality, how attorneys determine whether the factual predicate for disclosure of confidences has been met, and the impact of such interactions and determinations on clients and how this influences what they say to lawyers and conceive of the quality of the representation that they are receiving.

## 2. "Ordinary" Ethics

A factually-sensitive ethics scholarship should move beyond the extraordinary circumstances that are often the bread and butter of discussions of legal ethics. These "hard cases"—witnesses and clients who unambiguously threaten or commit perjury,<sup>208</sup> whether to disclose an opposing party's potentially life-threatening medical condition that the opposing party does not know about,<sup>209</sup> a client's confidential confession to a murder for which an innocent person is about to be executed<sup>210</sup>—are superb vehicles for reconsidering the principles underlying legal ethics. This, however, comes at a price. While these circumstances are rife with issues of fact, factual issues inevitably fade in light of the spectacularly difficult challenge of reconciling

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205. *Id.* at 1496.

206. *Id.*

207. *Swidler & Berlin v. United States*, 524 U.S. 399, 409 n.4 (1998) (in determining that the attorney-client privilege continues after a client's death, Court noted that "[e]mpirical evidence on the [attorney-client] privilege is limited"). William Simon has been a particularly strong critic of how often defenses of confidentiality are "sloppy, cavalier, and dogmatic" and rely on "assumptions about behavioral trends" without empirical evidence to back them up. SIMON, *PRACTICE OF JUSTICE*, *supra* note 5, at 56.

208. *See supra* text accompanying notes 1-2.

209. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

210. *See* SIMON, *PRACTICE OF JUSTICE*, *supra* note 5, at 163. For a discussion of the purported "historical" pedigree of this situation, *see supra* note 62.

the principles at stake. Moreover, these circumstances are extraordinarily rare in practice.<sup>211</sup>

There are, however, many “ordinary” ethical situations that lawyers repeatedly encounter in practice that are strikingly underrepresented in ethics discourse, and often the challenges of these situations center on issues of fact. For example, as discussed throughout this Article, a common problem is not the “client perjury issue” in its pure form, but, as with Ms. Cooper, the numerous instances where “truth” or determining “what happened” is elusive and embedded in many issues at play in representation.<sup>212</sup> In this and in other circumstances,<sup>213</sup> whether the factual predicate of an ethical rule has been met is much more frequently at issue than the more classic, simplified circumstances of fact hypotheticals. Moreover, issues related to the allocation of decision-making power between attorney and client<sup>214</sup> and how confidentiality influences representation<sup>215</sup> exist virtually every time attorneys and clients talk to each other. These questions are no less fascinating, challenging or important for being “ordinary.”

### 3. New Theories and Methodologies

As I have already noted, conventional legal analysis is not well suited to exploring the factual dimension of ethical decision-making.<sup>216</sup> However, methodologies from the social sciences hold great promise in this area. Collaborations among ethics scholars and social scientists would resonate with recent trends towards interdisciplinary scholarship,<sup>217</sup> including examples from

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211. See Tremblay, *supra* note 46, at 29 (noting that in “16 years” as a practicing lawyer and clinician, he never encountered such “dramatic” ethical dilemmas, although his “practice is always ethically challenging”). As a practitioner and clinician, I also have never confronted these challenges. As Tremblay notes, however, the point is that the many ethical issues that do arise in practice (and which often involve issues of fact) are underrepresented in ethics discourse. *Id.*

212. See *supra* text accompanying notes 18-19, 95-96, 137, 155. In addition, the “truthfulness” issue recurs in less dramatic instances, including negotiations, affidavits and written submissions to courts and agencies. These “ordinary” circumstances as situated in practice also warrant greater exploration in ethics discourse.

213. Other examples include whether under Model Rule 8.3 a lawyer has sufficient “knowledge” of misconduct by another lawyer in order to trigger a reporting requirement, whether under Model Rule 1.13 a lawyer for an organization “knows” that the organization is about to commit a “violation of its legal obligation,” and whether under Model Rule 1.7(a) a lawyer “reasonably believes” that a conflict “will not adversely affect” representation of a client.

214. See *supra* text accompanying notes 202-06.

215. See *supra* text accompanying note 207.

216. See *supra* text accompanying notes 109-118.

217. See, e.g., Rachlinski, *supra* note 39; George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993). Even a critic of some types of interdisciplinary work notes that “the most important general development in legal scholarship over the past two decades has been the remarkable flourishing of interdisciplinary work bringing together law and the

the literature on professional ethics and studies on the attorney-client relationship.<sup>218</sup>

One potentially rich methodology is called "discourse analysis."<sup>219</sup> Discourse analysis explores the microdynamics of conversation, and, in so doing, focuses on the shifts and meanings that come into play as one or more individuals interact.<sup>220</sup> By capturing the fluidity of discourse, discourse analysis would reintroduce the interpersonal as an integral aspect of ethical decision-making.<sup>221</sup>

The value of discourse analysis is particularly apparent when recalling that facts are extratextual, embedded in a world in which circumstances and relationships—and our interpretations of these circumstances and relationships—shift over time.<sup>222</sup> By examining these shifts as lawyers or law students interact with clients or each other in situations identified by ethical rules as potentially problematic, scholars could explore these pressures, understandings, and misunderstandings as they get played out as attorneys interpret what is happening.

In addition, a rich literature in social psychology<sup>223</sup> and cognitive science<sup>224</sup> offers an array of insights into how humans construe the stream of

humanities and social sciences." Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J. L. & HUM. 79 (1992).

218. Indeed, a growing number of legal scholars recognize that the insights and methodologies of social scientists can vastly enrich the tools legal scholars have to explore otherwise obscured dimensions of the practice of law. Elizabeth Mertz, for example, has identified a "push for a new synthesis that brings together legal theory, legal practice, and empirical research on law" as a way to foster an "adequate understanding of how practicing attorneys identify, negotiate around, and respond to ethical dilemmas in their everyday experiences." Elizabeth Mertz, *Legal Ethics in the Next Generation: The Push for a New Legal Realism*, 23 L. & SOC. INQUIRY 237, 241 (1998). See also David Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241, 245 (1995) (description of interdisciplinary teaching of ethics); John M. Conley & William M. O'Barr, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990) (collaboration between professor of law and professor of cultural anthropology and sociology on how litigants interact with the legal system); Felstiner & Sarat, *supra* note 153 (collaboration between sociologist and legal scholar on how power is negotiated in attorney-client relationships in divorce cases).

219. For a description of discourse analysis, see Gellhorn et al., *supra* note 153, at 251-55.

220. See, e.g., Robinson, *supra* note 39, at 143.

221. Some legal scholarship has recently begun to draw upon this technique. See, e.g., Felstiner & Sarat, *supra* note 153; Smith, *supra* note 153; Gellhorn et al., *supra* note 153; CONLEY & O'BARR, *supra* note 218. Discourse analysis has been used far more extensively in investigating doctor-patient relationships. See Gellhorn et al., *supra* note 153, at 247-48.

222. See *supra* text accompanying notes 124-55.

223. See *supra* text accompanying notes 126-34.

224. The impulse behind cognitive science is "to discover and to describe formally the meanings that human beings creat[e] out of their encounters with the world, and then to propose

events that eventually congeal into “the facts.” For example, as I have noted, social psychology describes in detail many cognitive shortcuts employed by humans when interpreting facts.<sup>225</sup> Cognitive science has, among other things, explored how humans construct meanings through metaphors and categories.<sup>226</sup> While such insights have on occasion appeared in legal scholarship<sup>227</sup> and ethics scholarship,<sup>228</sup> there are enormous opportunities for significant work in these areas.

#### 4. Coming Full Circle: Reconsidering Rules

Although perhaps counterintuitive, an ethics scholarship that takes facts seriously would generate fresh insights about rules of ethics.

One foundational issue is the impact of rules themselves. An unspoken assumption underlying the recent explosion of ethics rules<sup>229</sup> and proposals advocating different rules for different practice contexts<sup>230</sup> is that rules are the primary means through which to promote an ethical practice of law. A more factually-focused scholarship might explore whether rules meaningfully influence attorney conduct. Instead, perhaps more training, discussion and scholarship on the plethora of issues relating to the construction of facts would

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hypotheses about what meaning-making processes [are] implicated.” JEROME BRUNER, *ACTS OF MEANING* 1-11 (1990) (describing the history and development of the “cognitive revolution”).

225. See *supra* text accompanying notes 126-34.

226. For a comprehensive description of the role that metaphors and categories play in cognition, see GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987). See also GEORGE LAKOFF AND MARK JOHNSON, *METAPHORS WE LIVE BY* (1980). For an application of cognitive science to ethics generally, see JOHNSON, *supra* note 30.

227. For example, Steven L. Winter has produced an important body of scholarship that applies cognitive science to jurisprudence. See, e.g., Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for the Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989). For an example of the application of cognitive science to lawyering theory, see Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 317 (1995). For summaries of how legal scholars have applied psychological theories of decision-making, see Rachlinski, *supra* note 39 (detailing the rise of “behavioral decision theory” in legal scholarship), and Langevoort, *supra* note 113, at 1506 (1998) (collecting legal scholarship that applies behavioral theories of judgment).

228. Donald C. Langevoort has written most extensively on psychology and legal ethics. See *supra* note 126.

229. See *supra* text accompanying notes 14, 41.

230. See *supra* text accompanying notes 41-45.



do more to sensitize practitioners and law students to the many concerns underlying ethical rules.<sup>231</sup>

Moreover, the fact-based issues I have described would significantly contribute to debates about specific rules. A good example concerns the degree to which a lawyer has a duty to investigate suspected client fraud and the related issue of "avoidance of knowledge" that I described earlier.<sup>232</sup> Well-publicized instances of attorneys who ostensibly shut their eyes to what appears to be obvious fraud, such as the actions of attorneys representing OPM<sup>233</sup> and Lincoln Savings & Loan,<sup>234</sup> has led ethics discourse to pay increasing attention to these issues.<sup>235</sup>

Our understanding of these sorts of situations would greatly benefit from sustained examination of the fact-finding issues I have highlighted. While the caricature of the greedy client subsidizing a greedy lawyer's studied indifference to a client's financial irregularities tends to define debates in this area, the circumstances facing most attorneys in practice are far more complex.<sup>236</sup> A fact-based ethics discourse would move away from caricature towards a more nuanced consideration of the multitude of situational and psychological factors that influence attorney fact-finding. In the end, such investigations might help us to better understand what obligations (if any) attorneys might have in the face of factual uncertainty and explore whether rules can be reformulated to provide more meaningful guidance on the question.

##### 5. Jettisoning Fact Formalism in Ethics Theory

Finally, this new ethics scholarship would complement and enrich existing theories of ethical decision-making.

William Simon and David Luban have respectively argued that ethical decision-making should include "contextual" issues such as "justice,"<sup>237</sup> and

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231. As noted *supra* note 45, some scholarship has in fact suggested that the role that rules play in ethical decision-making is vastly overstated.

232. See *supra* text accompanying notes 91-99.

233. For a description of the OPM matter, see *infra* text accompanying notes 256-61.

234. See *supra* text accompanying notes 138-51.

235. Unsurprisingly, much of the discourse on these issues relates to issues of what rules apply. This issue is especially complex because the more prominent examples of this question, such as the Keating matter, take place in the context of banking and securities law which, in turn, impose duties on attorneys separate and apart from obligations under ethical rules. See generally George H. Brown, *Financial Institution Lawyers as Quasi-Public Enforcers*, 6 GEO. J. LEGAL ETHICS 637 (1994). The degree to which there are obligations beyond those in ethical rules is hotly disputed. *Id.* at 640-41.

236. See *supra* text accompanying notes 138-51 (exploring this point in the context of the Kaye Scholer matter).

237. See *supra* text accompanying notes 51-54.

“personal morality.”<sup>238</sup> Other scholars have argued for more finely tuned ethics rules that better reflect the many contexts of practice.<sup>239</sup> By combining a factually sensitive approach with a richer understanding of legitimate sources of ethical guidance—in essence, by taking anti-formalism seriously from both the fact and the law side—scholars could seek to refine theories of ethical decision-making by more accurately reflecting the richness and complexity of ethics in practice. This might ultimately produce a more dynamically conceived ethics that grapples with the challenges of deciding problems of ethics *in situ* without static facts or, for that matter, static rules as predicates. While the preceding analysis can only hint at what such an ethics would look like as a matter of theory, it is clear that such an ethics would capture much of what ethics is like in the field.

### C. *Implications for Ethics Pedagogy*

Addressing issues about facts and their role in ethical decision-making can add richness and depth to the more traditional rules-focus of ethics pedagogy and ultimately to the way attorneys engage in ethical decision-making in practice.<sup>240</sup> The themes developed in this Article can be explored through a number of teaching styles and pedagogical techniques.<sup>241</sup> My intention is not to propose one systematic way to investigate these themes with students, but to offer a menu of options from which to pick and choose. Indeed, instructors can use many of these techniques in combination. Such flexibility is important given that available options are often contingent upon resource limitations, credit hours for the course, and instructor experience and preference.

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238. See *supra* text accompanying notes 64-69.

239. See *supra* text accompanying notes 41-45.

240. The importance of facts and fact investigation in training law students has been building for some time, and has been manifested most prominently in the ABA's "MacRate Report" in 1992. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUC. AND PROF'L DEV.—AN EDUC. CONTINUUM, REP'T OF THE TASK FORCE ON LAW SCHOOLS AND THE PROF.: NARROWING THE GAP 38 (1992) (citing and detailing "factual investigation" as a "fundamental lawyering skill"). This impulse has even led some states to supplement that most rule-bound of institutions—the bar examination—with a "Multistate Performance Test," an avowed purpose of which is to explore an applicant's ability to "[i]dentify relevant facts" and to "[p]lan a factual investigation." NAT'L CONF. OF BAR EXAMINERS, THE MULTISTATE PERFORMANCE TEST: 1999 INFO. BOOKLET 3 (1998). See also Randall T. Shepard, *From Students to Lawyers: Joint Ventures in Legal Learning for the Academy, Bench and Bar*, 31 IND. L. REV. 445, 453 n.26 (1998) (listing states that have adopted the Multistate Performance Test).

241. Over the past few decades, substantial literature has emerged which reviews and/or advocates different pedagogical techniques in teaching legal ethics and professional responsibility. See generally Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEG. ED. 75 (1991). See also *supra* text accompanying notes 9-12.

Before examining specific techniques, one general observation is important to bear in mind. A judicial perspective radically thins the nature of ethical decision-making.<sup>242</sup> This is because a judicial perspective typically evaluates the actions of others given a situation, not in the context of the uncertainty and change that happens *within* a situation from a certain perspective. In ethics pedagogy, therefore, students should *be* attorneys whenever possible, preferably attorneys embedded in a stream of events that implicate ethical decision-making. Such a perspective helps to replicate the pressures and influences and factual uncertainties faced by attorneys in practice.

Keeping this general principle in mind, what follows is a range of techniques that can expose students to the factual dimensions of ethical decision-making. I first discuss the techniques that most effectively explore fact issues, and then progress (or, rather, regress) to the least effective. Nevertheless, with a certain amount of tweaking and shifts in emphasis, issues of fact can be investigated through all of these techniques.

### 1. Clinical Teaching

Classroom teaching about ethics is necessarily artificial; it can never replicate the nuances and tensions of practice. The same is true of simulations. As the name implies, simulations simulate, but a simulation is not the real thing. The value of live-client clinical teaching, therefore, is that ethics issues arise in live-client clinics as they do in practice because clinical teaching *is* practice, albeit practice with the added advantage of a clinician who can guide and encourage students to reflect systematically about the complexities of their tasks.<sup>243</sup>

In terms of the themes I have developed thus far, clinical teaching is an extraordinarily effective means to explore ethics because there is no escaping the challenges of fact-finding and ethical decision-making when representing clients. In Austin Sarat's phrase, "the hypothetical materializes" in clinics,<sup>244</sup> and the uncertainties of ethical decision-making are virtually impossible to miss if the clinician and other students work through the complexities of the situation together. A clinical experience also helps students come to grips with

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242. See *supra* text accompanying notes 167-70.

243. For discussions of teaching ethics in the context of clinics, see Luban & Millemann, *supra* note 4; Tremblay, *supra* note 46, at 33-42; Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109 (1996); Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996); Solomon, *supra* note 12; Leleiko, *supra* note 12.

244. Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL ED. 43 (1991). See also Tremblay, *supra* note 30, at 521 (advocating "'thick' descriptions of context" instead of "hypothetical problems" in the teaching of ethics, and noting that "the clinic . . . offers the most promising environment for students to experience the levels of tension and ambiguity necessary to develop practical judgment" on questions of ethics).

ethics as immanent in practice, that is, an “ethics issue” is virtually never a free-standing “problem” that can meaningfully stand separate and apart from other aspects of practice. Indeed, as I have previously noted, ethics issues resonate throughout an attorney’s relationships with clients, colleagues, judges or adversaries, and this happens over time as interpretations of circumstances shift.<sup>245</sup> No pedagogical technique can fully duplicate this textured experience except experiential teaching itself.<sup>246</sup>

An example of the potential of clinical ethics pedagogy is the case of Mrs. Cooper.<sup>247</sup> A student handling this case would, among other things, need to recognize that the factual question of Ms. Cooper’s possible substance abuse is critical not only as an ethics issue, but also as an issue central to her disability case. Next, as I described earlier,<sup>248</sup> the student would need to determine whether there even is an ethical problem by grappling with the uncertainty about whether and how much Ms. Cooper has engaged in substance abuse. In reaching this determination, the student would be faced with a menu of different strategies as to how to explore this issue. The student would then need to reevaluate the situation as it unfolds in light of the student’s decisions about how to proceed.

In contrast, consider the likely form that Ms. Cooper’s case would take as a fact hypothetical: “You represent a disability claimant who tells you that she has not abused drugs. You know that this is false. She plans to testify under oath that she has not abused drugs at the hearing. What ethical obligation do you have?” This hypothetical completely misses the texture, challenges and opportunities inherent in an actual circumstance.

Teaching ethics in a clinical setting, therefore, offers an unparalleled opportunity for students to experience how ethics issues fold into the realm of facts and into the representation itself. This promotes not only a richer consideration of the factual issues at play in the ethical problem, but also a deeper understanding of the client and her circumstances, which is a positive goal in and of itself. The result is a deeper understanding of ethical decision-making and of legal representation as a whole.

Nevertheless, teaching ethics exclusively through live-client clinics does have potential limitations. Ethics issues in clinical teaching arise organically out of cases that are being handled in a given period of time. This means that it is at times difficult for a clinic to offer a comprehensive and systematic overview of the sorts of problems attorneys may encounter in practice,

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245. See *supra* text accompanying notes 136-55; 167-86.

246. An additional advantage of teaching ethics through clinics is the degree to which it hones a student’s ability to spot ethics issues. Ethics issues rarely self-identify themselves, and observing how they arise out of the stuff of representation is a critical way to sensitive students to ethical issues they will likely encounter in practice.

247. For a description of this problem, see *supra* text accompanying notes 18-19.

248. See *supra* text accompanying notes 137, 155.

although there is still great value in modeling approaches to ethical decision-making even in limited circumstances. In any event, live-client clinics require a significant allocation of resources, an allocation that as a practical matter a given school may not make available to all students. Classroom courses thus remain a useful and, for some students and institutions, a primary means of exploring legal ethics and professional responsibility.

## 2. Simulations and Role Plays

There are increasing calls for the use of more simulations and role-plays in ethics pedagogy as well as in other areas of the law school curriculum.<sup>249</sup> These methods are particularly well suited to explore the fact-based issues that arise in ethical decision-making. They serve as something of a corrective for the temporal distortion I describe above—the tendency of ethics discourse to collapse time spent on fact-finding and investigation into a brief recitation of “the facts.”<sup>250</sup>

Role-plays, however, do not by themselves necessarily promote greater sophistication about fact-finding. Role-plays that cast students as advocates before disciplinary committees or as lawyers meeting with other lawyers in a meeting of a firm’s “ethics committee” likely offer prepackaged facts, and thus emphasize the simplified view of facts present in ethics discourse generally.<sup>251</sup> Instead, simulations must not clarify factual ambiguities, but encourage students to explore and confront them. The most effective simulations in this regard are those that force students to face these challenges by casting students as attorneys dealing directly with clients.<sup>252</sup>

In addition, role-plays can never replicate the many feelings and pressures at play when attorneys encounter ethical quandaries.<sup>253</sup> The responsibilities one feels towards flesh and blood clients, how these responsibilities might or might not accord with ethical rules and norms, and how this interplay influences the interpretation of facts can only fully be experienced by students in the context of real cases, not simulations.

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249. See, e.g., Burns, *supra* note 11; Freiman, *supra* note 11.

250. See *supra* text accompanying note 72.

251. For example, in a series of attorney/client simulations, Steven Hartwell asked students to propose ethical rules to govern the situation and, in performing the simulation, the instructors only intervened on occasion “to clarify factual ambiguities.” Hartwell, *supra* note 11, at 523. While this type of simulation no doubt is valuable as a means to focus on doctrine, it does not explore the factual dimension of ethical decision-making.

252. For examples of such simulations developed by Carrie Menkel-Meadow, see ROY D. SIMON & MURRAY L. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* 131, 297-98, 379-80 (2d ed. 1994).

253. See *supra* text accompanying notes 169-86.

### 3. Case Studies

Clinics and simulations cast students as lawyers, and thus offer the greatest potential for students to experience the complexity of ethical decision-making. However, case studies that present narratives about ethics can also be effective.

Among non-role playing techniques, case studies offer the best means for exploring fact-finding.<sup>254</sup> Unlike judicial opinions, a primary purpose of which is to present facts and law to justify a judicial decision,<sup>255</sup> case studies tend to focus on narratives about facts and can be constructed through primary materials such as memoranda, transcripts, or videos. Carefully chosen case studies can thus highlight fact-finding and fact indeterminacy.

An example of a factually rich case study is the story of OPM Leasing Services, Inc.<sup>256</sup> OPM—the acronym stood for “other people’s money” — purchased computers that it then leased to corporate customers.<sup>257</sup> OPM’s primary counsel, Singer Hutner Levine & Seeman, advised OPM on leasing transactions and provided opinion letters to lenders regarding the validity of OPM’s leases.<sup>258</sup> Ultimately, sixty percent of Singer Hutner’s billings were attributable to OPM.<sup>259</sup> A principal of OPM eventually disclosed to a Singer Hutner partner that he had engaged in fraudulent transactions, but he repeatedly stated that these activities “were all in the past.”<sup>260</sup> Subsequent conversations and an examination of documents revealed more possible irregularities, and Singer Hutner, along with two ethics experts it hired, wrestled with the issue of the degree to which it could or should press OPM to disclose details about its financial practices. Ultimately, Singer Hutner learned that OPM had engaged in a massive, ongoing fraud and in light of this information, engaged in a “phased withdrawal” of its representation.<sup>261</sup>

Even in my radically stripped-down summary, the story of OPM is saturated with points of entry to discuss attorney fact-finding and ethics: the dribbling out of evidence of possible fraud, the shifting credibility and ambiguity of OPM’s assertions that any wrongdoing had ended, the degree to which lawyers should explore suspected wrongdoing and how to do the exploring, the economic self-interest of Singer Hutner and whether it led the

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254. For texts employing the case study method, *see* HEYMANN & LIEBMAN, *supra* note 172; James L. Kelley, *LAWYERS CROSSING LINES* (2001). *See generally* Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787 (2000).

255. *See infra* text accompanying notes 264-66.

256. The OPM story is recounted in a number of ethics texts. *See, e.g.*, HEYMANN & LIEBMAN, *supra* note 172, at 184-97 (1988); SIMON & SCHWARTZ, *supra* note 252, at 93-96.

257. HEYMANN & LIEBMAN, *supra* note 172, at 185.

258. *Id.*

259. *Id.* at 186.

260. *Id.* at 188.

261. *Id.* at 193.

firm to interpret ambiguous facts in a way that gave OPM the benefit of the doubt. However, the risks of a case study like OPM is the risk that afflicts ethics discourse generally: a hindsight bias that views the ultimate “facts”—OPM’s ongoing fraud—as something that should have been obvious to the lawyers at the time. It is thus important to place students *in* the stream of events, not, as a judge, outside the stream of events as an omniscient observer. Moreover, a written narrative tends to limit discussion to only those details included in the narrative. Other details crucial to the fact-finding enterprise—such as exactly what Singer Hutner said to its client and vice versa—fall away. It would thus be important to explore exactly what Singer Hutner could or should have said to its client in light of its evolving interpretation of the circumstances.

#### 4. The Problem Method

The “problem method” is an influential pedagogical technique in teaching ethics.<sup>262</sup> This method tends to rely on written hypotheticals designed to demonstrate the application of legal rules. Like most fact hypotheticals, these problems are often relatively short and use facts as a conduit to talk about rules. Indeed, the authors of one text adopting the problem method “tried to keep the problems simple, believing that on a ‘blank canvas’ without too much detail we allow for the broadest possible analysis.”<sup>263</sup>

The exclusive use of the problem method risks eliminating factual issues altogether from ethics pedagogy. Careful use of the technique with an eye to issues of fact, however, holds promise. For example, problems could place students in the stream of events described by the problem, and ask the student/lawyers what they would do as attorneys in light of the problem. This question opens up issues of fact-investigation and construction and the challenges of maintaining the attorney-relationship when issues of ethics are in play. The problem method can also, like the OPM case study, present situations that are factually textured and ambiguous. Finally, the problem method can act as a jumping off point for classroom simulations. Through such a hybrid technique, students or the instructor can play roles derived from the problem as part of a classroom discussion, thereby flushing out embedded issues of fact.

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262. A widely used casebook that employs this method is THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* (7th ed. 2000).

263. RICHARD ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 3 (1995).

## 5. Judicial Opinions

The use of judicial opinions carries special risks in simplifying facts.<sup>264</sup> Appellate cases typically present facts as objective and certain.<sup>265</sup> Given that it is extraordinarily unusual for cases to discuss the complexities of fact-finding, cases tend to be poor vehicles for helping students confront the intricacies of fact-finding.<sup>266</sup>

There are, nevertheless, exceptions. Some decisions excerpt depositions or trial testimony, the careful examination of which can reveal the different perspectives of attorneys and clients. For example, *Togstad v. Vesely, Otto, Miller & Keefe*<sup>267</sup>—a legal malpractice case—explores the issue of whether an attorney-client relationship was established after an initial client consultation. The opinion includes excerpts from the testimony of one of the plaintiffs and the testimony of one of the defendant-attorneys. The client's testimony includes the following exchange:

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264. The use of judicial opinions—or the “case method”—is, of course, the paradigmatic method of law school teaching. This is largely through the continuing influence of Harvard Dean Christopher Columbus Langdell, whose pedagogy viewed the case method as the best way to learn legal rules. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 52-53 (1983).

265. For an especially enlightening critique by a judge of “[t]he conventional wisdom that the ‘Facts’ portion of an appellate opinion merely recites neutral, predetermined ‘facts,’” see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1386-90 (1995), and Rubinson, *supra* note 168, at 4 (describing how judicial opinions “present facts as determinate and finite when in fact they are carefully chosen to present a given story”).

266. See, e.g., Brest & Krieger, *supra* note 128, at 532 (noting that “[a]ppellate cases, with the facts neatly bundled in a few paragraphs,” fail to help students reenact lawyers’ roles in the litigation); Subin, *Reflections*, *supra* note 77, at 136 (law students are “largely oblivious to the fact-finding process (facts are always already found in casebooks)”). Some have gone even further and argued that the heavy emphasis on judicial decisions in law school “reflects a fundamental misunderstanding of the legal system, because the overwhelming preponderance of legally significant decisions are made by lawyers, not judges, legislators, or theorists; and the overwhelming preponderance of lawyer decisions will never be reviewed or even perceived by any other official.” Luban & Millemann, *supra* note 4, at 38. See also Sanford Levinson, *What Do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 453-54 (1985) (noting that the “emphasis on the judiciary is the bane of Anglo-American jurisprudence” and criticizing “a jurisprudence” of “law without lawyers”); Subin, *Further Reflections*, *supra* note 77, at 700 (arguing that “the criminal process is largely administrative in nature, with heavy reliance on the ‘unsupervised, procedurally unchecked and partly intuitive decisions of the defense attorney’”); Hazard, *supra* note 21, at 133 (ethical decision-making typically occurs in “the silent world of personal consciousness”); Wilkins, *supra* note 9, at 513 (most of attorneys’ “judgments will be made in the lawyer’s office and will remain unknown to officials, adversaries, and even to clients”).

267. 291 N.W.2d 686 (Minn. 1980). Portions of this decision are reprinted in several leading ethics casebooks. See, e.g., GILLERS, *supra* note 91, at 692; GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 457 (3d ed. 1999).



Q: And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an attorney-client relationship?

[Plaintiff]: I am not sure how to answer that. It was for legal advice as to what to do.<sup>268</sup>

In contrast, the attorney's testimony avoided construing the conversation as involving "legal advice," instead noting that "[t]he only thing I told [the plaintiff] . . . was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."<sup>269</sup>

The *Togstad* case certainly demonstrates the important principle that it is the client's perspective that determines whether or not an attorney/client relationship has been established.<sup>270</sup> This is no trivial point given that most ethical obligations are contingent upon whether an attorney-client relationship exists.<sup>271</sup> However, while *Togstad* does not involve attorney fact-finding *per se*, it does focus exclusively on the point in time when attorneys talk to clients—the time that drops out all too frequently in ethics discourse.<sup>272</sup> Moreover, the *Roshomon*-like narratives about what happened during a single attorney-client interaction help to explode the familiar omniscient perspective of ethical problems. Thus, cases such as *Togstad* can act as springboards for discussions about inference and perspective—critical ideas when thinking about how attorneys construe facts.

Another case to use as a point of entry for exploring fact-finding is *Nix v. Whiteside*<sup>273</sup>—perhaps the most famous judicial decision in legal ethics. *Nix* is undeniably important in understanding issues surrounding an attorney's duty in a criminal trial when a client intends to commit perjury.<sup>274</sup> The Court's recitation of the facts, however, offers possibilities for putting students into the shoes of attorneys who must construe facts:

Until shortly before trial, Whiteside [the criminal defendant] consistently

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268. *Togstad*, 291 N.W.2d at 690.

269. *Id.* at 691 (testifying further that plaintiff "was seeking my opinion as an attorney in the sense of whether or not there was a case that the firm would be interested in undertaking").

270. *See id.* at 693.

271. A primary exception is an attorney's duty to maintain client confidences, which begins prior to the formal commencement of an attorney/client relationship and extends beyond the termination of the relationship. *See, e.g.,* WOLFRAM, *supra* note 16, at § 6.7.2.

272. *See supra* text accompanying notes 152-55.

273. 475 U.S. 157 (1986). *Nix* is reprinted in virtually all casebooks on professional responsibility.

274. *Nix* held that an attorney who threatens to withdraw and reveal a client's proposed perjury in a criminal case does not deny the client effective assistance of counsel under the Sixth Amendment. *Id.* at 161-68.

stated to Robinson [Whiteside's attorney] that he had not actually seen a gun, but that he was convinced that [the victim] had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something 'metallic' in Love's hand. When asked about this, Whiteside responded: "[I]n Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead."<sup>275</sup>

The *Nix* opinion assumes this conversation presented Robinson with a clear instance of a client intending to commit perjury.<sup>276</sup> Prior to exploring the doctrinal significance of *Nix*, however, this brief window into the attorney-client relationship offers opportunities to investigate questions of uncertainty and fact investigation. What would students say to Whiteside in response to Whiteside's statement? Does Whiteside's statement now mean that the lawyer "knows" that his client is about to commit perjury? If not, what sorts of questions or statements should the lawyer use to explore the meaning of this statement? Instructors can explore such questions through class discussion, or, perhaps even more fruitfully, by breaking into a mini-simulation with students and/or the instructor playing Whiteside and Whiteside's attorney.

Moreover, *Nix* contains a rare bonus: an instance of a judge alluding to the profound disjunction between a judge's and an attorney's perspective as to facts and the ambiguity and uncertainty of fact-finding. In his concurring opinion, Justice Stevens states:

From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel. As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty . . . to take extreme measures to prevent the perjury from occurring. Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believes that he recalls) details that he previously overlooked.<sup>277</sup>

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275. *Id.* at 160-61.

276. The Court adopts the Court of Appeals' assumption that "for the purpose of the decision . . . Whiteside would have given false testimony had counsel not intervened." *Id.* at 171. Interestingly, while the certainty of Whiteside's perjury is a given in the opinion and the Court avoids addressing the level of certainty that attorneys must have that the client intends to commit perjury, the *Nix* oral argument included a lively colloquy among the justices and attorneys about these issues. See Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1939-46 (1988).

277. See *Nix*, 259 U.S. at 190-91 (Stevens, J., concurring).

Given the weight and legitimacy often accorded to statements by judges and especially by the Supreme Court, this passage offers an opportunity for students to reflect on the role facts play in the context of *Nix* and in ethical decision-making as a whole.

#### CONCLUSION

Ethics discourse should embrace the complexities of fact-finding as a critical dimension of ethical decision-making. To be meaningful, this goal requires shifting away from settled ways of “doing law” embodied in a rules-based methodology. Such a methodology views issues of fact as a means to the analytic end of interpreting rules, assumes that ethical decision-making is a static process of rule interpretation, and adopts a judicial perspective that is separate and apart from the events at issue. In contrast, a fact-based methodology views fluidity and change as hallmarks of ethical decision-making, recognizes that fact-finding often controls results when attorneys confront problems of ethics and that fact-finding is a complex act of interpretation entailing the consideration of many sources of information, and conceptualizes ethical decision-making as embedded in the maelstrom of events that constitutes legal representation.

By confronting these aspects of facts in ethical decision-making, ethics discourse would reflect the myriad challenges facing lawyers who must resolve problems of ethics in the field. Moreover, by emphasizing a renewed focus on the “thickness” of facts when confronting ethical problems, a fact-sensitive ethics discourse would promote the importance of understanding the circumstances of clients and cases. Such a newly refined ethics discourse would advance a critical goal—the promotion of a more comprehensive and textured approach to ethical decision-making and the practice of law as a whole.